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THE
PUNJAB RECORD

OR

Reference Book for Civil Officers,

CONTAINING

THE REPORTS OF CIVIL AND CRIMINAL CASES DETERMINED BY
THE CHIEF COURT OF THE PUNJAB AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM
THAT COURT AND DECISIONS BY THE FINANCIAL
COMMISSIONER OF THE PUNJAB.

REPORTED BY

ALWEYNE TURNER, BARRISTER-AT-LAW.

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v.38

JUDGES OF THE CHIEF COURT.

CHIEF JUDGE :

SIR WILLIAM CLARK, KT.

JUDGES :

MR. JUSTICE A. H. S. REID.

„	„	PROTUL CHANDAR CHATTERJI, RAI BAHADUR, C. I. E.
„	„	J. A. ANDERSON.
„	„	F. A. ROBERTSON (<i>Addl.</i>).
„	„	R. L. HARRIS (<i>Addl.</i>).

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1903.

CRIMINAL JUDGMENTS,
1903.

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1903.

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1. *Alluvion and diluvion—Rights of adna maliks in submerged land—Custom—Mauza Muradpur, tahsil Alipur, Muzaffargarh District—Wajib-ul-arz—Haq Juri.*—The plaintiffs, who were *adna maliks* in *mauza* Muradpur, *tahsil* Alipur, in the Muzaffargarh District, sued for a declaration of *adna malkiyat* rights in certain land which had been submerged by river action, which, on its reappearance in accordance with a provision of the *Wajib-ul-arz*, has been recorded as the sole property of the defendants. The provision of the *Wajib-ul-arz* was to the effect: "that in this village there are two kinds of property, *ala* "and *adna*. If the land belonging to any *adna malik* is washed away, "at the time of its being thrown up it becomes the property of *ala* "malik. The *adna maliks* retain no right in the land. The *adna* "maliks after paying *haq juri* to the *ala maliks* will be entitled to get "possession. Without paying *haq juri* they will have no right. If "the *ala maliks* intentionally refuse to take *juri* the *adna maliks* are "not entitled to take possession. The arrangement as to *juri* is to "depend upon the value of the land and the *status* of the *adna malik*. "But it shall not be less than Re. 1 per *bigha* or more than Rs. 2 per "bigha. The *adna maliks* shall have the same power whether the "whole or a portion of any wells are carried off."

Held, that as the payment of *haq juri* or an institution fee for the recovery of land cannot be considered opposed to the principles founded on universal law and justice, it was for the *adna maliks* to rebut the presumption in favour of the correctness of the entries of the record of custom and to prove that they were not bound to pay it.

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Held, that, as in the river Sutlej, between the Jullundur and Ferozepore Districts, the changes of deep-stream are more considerable and sudden than in English and Italian rivers, the rules applicable to gradual accretions of the descriptions contemplated by the English and Roman Law should not be followed.

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Code. The appellant's counsel urged that, as neither he nor his client were aware of the date on which the judgment was to be delivered or were aware of it until just before the appeal was filed, asked the Court to excuse the delay in filing of the appeal under the provisions of Sections 5 and 5 (a) of the Limitation Act, and that he might also be allowed to file a copy of the decree and judgment.

Held, (i) that as under Section 16 of the Punjab Courts Act it was unnecessary for a Judge of the Chief Court to pronounce his judgment in open Court or on a date appointed and announced to the parties, the appellant was not entitled to claim consideration on that account as a matter of right, and that, as the appeal was filed after the period allowed by Article 151 of the Limitation Act, it was barred by time;

(ii) that as an Appellate Court could not dispense with the presentation of a copy of the decree appealed against, the appeal filed by the appellant was not a good appeal in law;

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And Section 588 (28)—Appeal from order of remand in an unclassified suit under Rs. 200 in value—Power of Chief Court to go into the merits on appeal from remand order.—Held, by the Full Bench, that in hearing an appeal under Section 588 (28), Civil Procedure Code, the Chief Court is not confined to the mere question of procedure; it can and should go into the merits of that preliminary point upon which the

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lower Appellate Court has remanded the case under Section 562; and where in the preliminary point questions of law or custom are involved it can and should discuss those questions.— <i>MAHA RAM v. RAM MAHAR</i>	1
SECTION 588 (21).	
<i>Application to be brought on to record in substitution for plaintiff—Dismissal of such application—Appeal.</i>	
See <i>Appeal</i> , No. 5	57
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SECTION 623.	
<i>Attachment—Objections to attachment dismissed for default—Remedy of Objector—Procedure.</i> —When a person making an application within Chapter XIX fails to prosecute it, the Court must dispose of it by dismissing it in default, and in such case the objector is only entitled to make a fresh application to obtain his relief if he is not otherwise barred, but when such an application has been disposed of on the merits the Court cannot entertain another of the similar nature, or can alter or set aside its order except on review under Section 623, the provisions of which do apply to such proceedings.— <i>COATES v. KASHI RAM</i>	76
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SECTION 16.

Undue influence—Parda nishin woman—Execution of deed by parda nishin in favour of a person who is in relation of active confidence—Burden of proof—Presumption of a recital in a registered deed as to receipt of consideration—Evidence Act, 1872, Section 111—Suit on bond not legally enforceable—Right to revert to original consideration.— Plaintiff sued upon a registered bond purporting to have been executed by the defendant, a married *parda nishin* lady of Delhi. The defendant admitted execution, but pleaded that the bond was without consideration and fictitious for fear of her husband who was addicted to extravagance and waste. It was proved that the defendant was the daughter of plaintiff's maternal uncle, and had been brought up in plaintiff's house and married from there, and that in fact the plaintiff was the only relation she had on her father's side, that the plaintiff held a position of active confidence with reference to her, as her husband being an unbusiness-like man, she had to call in plaintiff's aid in order to save the family property from being wasted which had been gifted to her by her husband in full ownership. The bond sued upon was executed in plaintiff's house at Hatbras, and all the witnesses and persons present at the execution were his servants, defendants, or friends. There was no one to help the defendant with advice or other assistance, her husband with whom she had all along continued to live not being even present.

Held, that such circumstances were sufficient to modify the ordinary presumption arising out of a recital in a registered bond, "that when a bond is registered and its execution is admitted by the defendant, the *onus* of proof of want of consideration and of free consent not having been given would lie on the party seeking to get out of its effect," and that the *onus* of proving good faith, fair dealing, and full and free consent must be laid on the party interested in upholding the transaction, and in the absence of such proof the deed must be declared as not binding on the executant.

Plaintiff's prayer for an inquiry into the accounts which formed the alleged consideration of the bond and decree thereupon refused under the circumstances.—*HOTI LAL v. MUSSAMMAT RAM PIARI*

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SECTION 23.

Marriage—Betrothal—Barter of one girl in marriage for another—Breach of promise of marriage—Void agreement—Public policy—Measure of damages.—Held, that a family arrangement of inter-marriages of sons and daughters of various families known as "*bil muwaza*" amongst persons of the same class is not void as opposed to public policy, but as such arrangements are not held in the highest repute, the injured party is not entitled to heavy damages on its breach.—*AMIR CHAND v. RAM*

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SECTION 62.

Contract—Novation—Right of a party to fall back on the original cause of action.— Defendants owed some money to the plaintiff on book

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account, they executed certain *hundis* in discharge of that debt. On maturity the *hundis* were dishonoured. The plaintiffs sued the defendants on the original debt, the defence being novation of contract.

Held, that the plaintiffs not having endorsed or lost or parted with the *hundis* under such circumstances as to make the defendants liable upon them to some third parties were entitled to sue on the original debt which had not been extinguished by the fact of the receipt by plaintiffs of the *hundis* by way of security.—BALDEO SAHAI v. MUL CHAND ... 7

SECTION 245.

And Section 264—Dissolution of partnership—Liability of retired partner for debts contracted after dissolution.

See *Partnership*, No. 2 78

COURT FEES.

Suit by pauper—Application for leave to sue in forma pauperis—Subsequent payment of Court-fees after period of limitation—Date of institution of suit.

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COURT-FEES ACT, 1870.

SECTION 7 (iv) (b).

Partition—Suit to enforce a right to share in joint family property—Valuation for purposes of Jurisdiction and Court-fee—Suit Valuation Act, 1870, Section 8.

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CRIMINAL PROCEDURE CODE, 1898.

SECTION 488.

Suit for a declaration that the defendant is not the lawful wife of the plaintiff—Jurisdiction of Civil Court to entertain such a suit when an order for maintenance passed under Section 488 of the Criminal Procedure Code is in force against the plaintiff.

See *Marriage*, No. 3 26

CUSTOM—ADOPTION.

Alienation by Jat proprietor—Gift in favor of sister's son—Suit by a reversioner to declare the gift invalid and not to be binding after the donor's death—Donee setting up his own adoption as a bar to the suit—Limitation.

See *Limitation Act*, 1877, Article 118 68

CUSTOM—ALIENATION.

1. *Alienation by Jat proprietor—Gift in favour of sister's son—Suit by a reversioner to declare the gift invalid and not to be binding after the donor's death—Donee setting up his own adoption as a bar to the suit—Limitation.*

See *Limitation Act*, 1877, Article 118 68

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2. *Custom—Alienation—Gift by sonless proprietor—Awans of mauza Dhanal, Jullundur District—Competency of sonless proprietor to make a gift to his daughter and her son in the presence of his collaterals in the third degree.*—In a case, the parties to which were Awans of mauza Dhanal, in the Jullundur tahsil, found, that a gift of ancestral land by a sonless proprietor in favour of his daughter and her son was valid by custom in the presence of agnates in the third degree.—*KHAIRU v. FATIU*

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3. *Custom—Alienation—Suit by reversioner to enforce his right in respect to land on the ground that the alienation had been made without necessity, which alienation had already been challenged by his ancestor on the ground of pre-emption only—Locus standi—Waiver—Necessity.*—One M. S. sold half of his land to the defendants in 1862, whereon the grandfather of the present plaintiff brought a suit to enforce his right of pre-emption, but his suit was eventually dismissed as he was unable to deposit the purchase-money. Shortly after M. S. mortgaged the remaining half of his land and the grandfather of the plaintiff again brought a suit which was compromised between the parties, the plaintiff's grandfather paying the mortgage-money and interest to the mortgagees. In neither of these suits did the plaintiff's grandfather challenge the power of M. S. to sell, or alleged that the sale or mortgage was without consideration or necessity, and as a fact he finally agreed to pay the amount mentioned in the purchase-deed and in the second he actually took over the mortgage. In 1897 the plaintiff filed the present suit in respect of the sale in 1862, on the ground that it was without necessity and did not bind him.

Held, that the plaintiff's grandfather by bringing his suit for pre-emption on the sale dispute abandoned any right he had to challenge it on the ground of want of necessity or other reason sufficient to make it voidable by him. Such a suit raised a pre-emption, which of course was not conclusive, that the sale was not bad on the ground of necessity, but it necessarily waived all right to set it aside for want of necessity, and that the plaintiff was bound by the waiver on the part of his grandfather, and on that account precluded from succeeding in the present claim.—*Held, also*, that the above facts certainly establish that there is some proof that the sale was not an improper one and was for necessity, and that in such cases if conclusive evidence as to necessity was not forthcoming it was due to the plaintiff's laches and delay in bringing the suit. That it would be unjust to expect the purchaser's sons and grandson to be able to supply strict proof in 1897 of the reasons which led the seller to transfer his land in 1862.

—*LABH SINGH v. GOPI*

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4. *Custom—Alienation—Alienation by sonless proprietor—Right of reversioner to contest such alienation in presence of wife and daughter-in-law—Right to sue—Kalar Jats of tahsil Jagraon, Ludhiana District.*—A, a sonless proprietor, sold his house to two of his collaterals, S. and G. The plaintiffs, who were nearer collaterals, sued for a declaration that the sale being without necessity should not affect their reversionary rights and should be held to be null and void after the death of A. The defendants pleaded that as A's wife and daughter-in-law were alive the plaintiffs had no *locus standi*. It was found that

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among the parties, who were Kalar Jats of the Jagraon tahsil, a widow was entitled on her husband's death to possession of his immoveable property for her life or until re-marriage, and that a daughter-in-law was entitled only to maintenance of his estate.

Held, that as the right of succession of the widow was only a "widow's estate," the plaintiffs, who were the nearest presumptive reversionary heirs, were entitled to maintain their action for a declaration irrespective of the question of collusion or concurrence by the widow, but were not entitled to possession until after the death or re-marriage of the widow in the event of her surviving A.—SUNDAR SINGH *v.* SAIN DITTA

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5. *Custom—Alienation—Gift by widow with the consent of the nearer reversioner—Suit by reversioner of equal degree.—Held*, that the fact that certain nearer reversioners assented to a gift by a widow of her late husband's property in favour of a near reversioner does not bar the claim of a reversioner equally entitled with the alienee.—THAKAR SINGH *v.* HIRA SINGH

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6. *Custom—Alienation—Distinction between gifts inter vivos and wills among Punjab agriculturists—Held*, by a majority (Clark, C. J., dissenting) that the distinction under Punjab Customary Law between power of gift *inter vivos* and power of testation is a matter of degree and form only, and where power of gift is shown to exist an initial presumption arises that there is a co-extensive power of testation.

Per Clark, C. J., contra, that under the Punjab Customary Law there is a marked distinction between the power of gift and the power of will, and that though the existence of a power of gift is a strong point in favour of the party asserting a power of will, it is not sufficient to relieve him of the *onus* of proving the existence of the latter.—MUSSANMAT BANO *v.* FATEH KHAN... ..

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7. *Custom—Alienation—Gift by sonless proprietor to daughter's son in presence of collaterals in the fifth degree—Hindu Zargars of Umballa City—Burden of proof—Hindu Law—Adoption—Ceremonies.—Held*, that the plaintiffs upon whom the *onus* lay had failed to establish that Hindu Zargars of Umballa City in matter of inheritance were governed by custom and not by Hindu Law or that collaterals in the fifth degree were entitled to succeed to the exclusion of a daughter's son.

The burden of proof that non-agricultural Hindus in matters of alienation and succession follow Punjab Customary Law rests on the person making such an allegation.

Semble.—The necessity of ceremonies in constituting an adoption among non-agricultural Hindus discussed.—MUNGU *v.* CHUNI LAL ...

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8. *Custom—Alienation—Alienation by Jat proprietor without male issue at the date of the alienation—Right of after-born son to contest such alienation on the ground of necessity.—Held*, by majority (Clark, C. J., dissenting) that under the Punjab Customary Law a transfer by an owner who has no heir existing at the time competent to challenge it cannot be contested by a son begotten by the owner after the date of

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the transaction unless there was in existence at the date of the transfer some one who would challenge it and such person did not ratify it before an after-born son was begotten.—JOWALA *v.* HIRA SINGH ... 55

9. *Custom—Alienation—Sheikhs of tahsil Attock, Rawalpindi District—Unequal distribution by father among sons.—Found*, that among Sheikhs of the Attock tahsil in the Rawalpindi District, a father is competent by custom to make an unequal distribution of his estate among his sons whilst he is alive ... HABIBULLA *v.* HABIBULLAH 62

10. *Custom—Alienation—Alienation of houses by non-proprietors—Mauza Siwan, Karnal District.—Found*, that in Mauza Siwan in the District of Karnal, non-proprietors occupying house property for three generations (from a period antecedent to the record of rights prohibiting against transfer of house was compiled) can transfer their houses without the consent of the proprietors ... BADRI *v.* UDHO 73

11. *Custom—Alienation—Will—Sandhu Jats of tahsil Tarn Taran, District Amritsar—Competency of a childless proprietor to make a will in favour of a distant collateral in presence of near collaterals—Burden of proof.—Found*, in a suit the parties to which were Sandhu Jats of tahsil Tarn Taran in the Amritsar District, that no custom enabling a sonless proprietor to make a valid disposition of his ancestral property by will in favour of a distant collateral in the presence of near collaterals had been established.

Where the power of transfer by will is not co-extensive with the power of transfer *inter vivos*, the *onus* that a proprietor has a power of alienation by will rests on the person setting up the will.—ISHAR SINGH *v.* LEHNA SINGH ... 86

12. *Custom—Alienation—Alienation by daughter—Necessity—Suit by reversioners to set aside alienation by daughter.—Found*, in a suit the parties to which were governed by the Punjab Customary Law that an alienation by a daughter holding land until her marriage for necessity was valid against the customary heirs.

As a general rule a daughter's tenure of her father's land until death or marriage is very analogous to that of a widow in her husband's property ... MUL SINGH *v.* KHANU 90

CUSTOM—INHERITANCE.

1. *Custom—Inheritance—Hindu Zargars of Dagshai—Exclusion of nephews by daughter's son—Hindu Law.*

See *Hindu Law—Inheritance*, No. 2 ... 61

2. *Custom—Inheritance—Right to succeed to wife who has inherited from her father—Ancestral property.—Held*, that among Hindu Jats of the Moga tahsil, Ferozepore District, a husband is not entitled to succeed to the ancestral property in possession of his wife inherited from her father, especially where her possession was only permissive.—KALA SINGH *v.* BUTA SINGH ... 16

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3. *Custom—Inheritance—Waraich Jats of Gujrat tahsil—Gift of ancestral property to daughter's son—Failure of direct heirs of donee—Right of heirs of donor to succeed to property gifted in preference to those of donee—Suit by a reversioner for possession of immovable property—Defendant in possession under will made by testator without title—Reversioner not barred by reason of his having failed to contest such will within three years.—In a suit the parties to which were Waraich Jats of the village of Kaka in the Gujrat District, found, that when a gift of ancestral property has been made to a daughter's son in virtue of that relationship and he dies without issue, the property reverts, on the death of the original donee, to the heirs of the donor and not to those of the donee.*

Held, that a suit by a reversioner to recover possession of immovable property in the hands of defendant under an alleged will cannot (where the testator had no power to dispose of the property by will) be barred by reason of his (the reversioner) having failed to contest the validity of such will within a period of three years.—HAYAT MUHAMMAD v. ALA BAKHSI. 19

4. *Custom—Inheritance—Tewari Brahmins of Amritsar City—Right of nephew to succeed in preference to daughter's son—Hindu Law.—Held, that plaintiff has failed to prove that Tewari Brahmins of the city of Amritsar are governed by custom, by which a daughter's son is excluded in succession by a nephew, and that in the absence of such custom the personal law of the parties (Hindu Law) must prevail according to which a nephew has no right to succeed in preference to a daughter's son.—MUSSAMMAT JAMNA DEVI v. CHUNI LAL 30*

5. *Custom—Inheritance—Pagvand and chundavand—Naru Rajputs of Hoshiarpur—Whole and half blood—In a suit the parties to which were Naru Rajputs of tahsil Hoshiarpur where the ancestral land had been divided on the chundavand and not on the pagvand principle, held, that the agnates of the whole blood had preference over the agnates of the half blood.—NATHA v. HUMMAT 31*

6. *Custom—Inheritance—Shia Sayads of Umballa City—Punjab Laws Act, 1872, Section 5—Muhammadan Law.—In a suit the parties to which were non-agriculturist Shia Sayads residing in the Kazi mohalla of Umballa City and owning little land outside, held, that the plaintiffs had failed to establish that they were governed by agricultural custom under which collaterals related in the fifth degree have a right to succeed to non-ancestral house property situated in the Umballa City or cantonments to the exclusion of a grandmother succeeding her grandson, or a married daughter succeeding her mother.*

Held, further, that in matters of succession under dispute the parties were governed by the Muhammadan Law and being Shia Sayads by the Imamia Code.

As the Punjab Laws Act gives equal protection to those governed by their personal law, as well as to those governed by custom, there can be no legal presumption in any case coming before a Court in the Punjab that it is to be governed by custom rather than the personal law of the

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parties. But in every case where a custom is set up it is the duty of the person alleging it to prove where it is not admitted that it exists and is applicable to the points in issue.—**MUHAMMAD HUSAIN v. SULTAN ALI**

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7. *Chief of Tank—Succession—Inheritance—Family custom—Primogeniture—Right of junior members of the family.*—On the death of a Chief of Tank the question arose whether by a family custom the entire estate descended to the Chief for the time being as head of the family and by virtue of his Chiefship or devolved according to the general custom of Jat agriculturist in the Punjab to be held jointly by the sons or their issues in equal shares, each having the right to claim partition. It was proved that the succession to the Chiefship went always in the line of primogeniture, except in one instance in which the eldest son was set aside on the ground of insanity and that with the Chiefship went the ownership of the land of the *ilaga*.

Held, that the whole estate known as Tank proper belonged to the Chief for the time being who was both ruler and proprietor, and that succession devolved upon the eldest son of the Chief, the other members of the family being entitled to maintenance only.—**MUHAMMAD AFZAL KHAN v. GHULAM KASIM KHAN**

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8. *Custom—Inheritance—Bhatias of Bannu District—Right of sister to succeed for life or until marriage.*—In a suit the parties to which were Bhatias of the Bannu District, *held*, that a sister was entitled to succeed for life or until marriage to the estate of her deceased brother.—**WASNA RAM v. MUSSAMMAT UTTAM BAI**

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DAMAGES.

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DECLARATORY DECREE, SUIT FOR.

Marriage—Suit for a declaration that the defendant is not the lawful wife of the plaintiff—Jurisdiction of Civil Court to entertain such a suit when an order for maintenance passed under Section 488 of the Criminal Procedure Code is in force against the plaintiff.

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DECREE.

Decree for pre-emption ex titling to state consequence of non-payment of pre-emptive price within the time prescribed thereby for payment—Civil Procedure Code, 1882, Section 214.

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And Section 55—Appeal against the order of a single Bench dismissing an application for dissolution of marriage—Necessity for copy of decree appealed against accompanying a memorandum of appeal—Civil Procedure Code, 1882, Section 541.

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SECTION 55.

Divorce—Dismissal by Single Judge of application for dissolution of marriage—Appeal from such order of dismissal—Punjab Courts Act, 1884, Section 9.—Held, that an appeal lies from all decrees and orders passed by a Single Bench in the exercise of its original jurisdiction in proceedings under the Indian Divorce Act, 1869, by virtue of Section 55 of that Act and Section 9 A. of the Punjab Courts Act.—C. v. C. AND B. 18

ESTOPPEL.

Guardian of minor—Lease of a portion of the property by guardian—Inability of minor to claim pre-emption.—Held, that in a pre-emption suit the mere fact that the guardian of the minor plaintiff temporarily leased a small portion of the property in suit at a date between the transfer and institution of the suit did not amount to an estoppel.—KISHEN SINGH v. JAI KISHEN DAS 2

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1. *"Assets realized by sale or otherwise in execution of a decree"—Money realized under an ultra vires attachment—Rateable distribution.*

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2. *Death of decree-holder—Abatement of execution proceedings—Admission of application to set aside abatement after time—Sufficient cause—Civil Procedure Code, 1882, Sections 365, 366, 371, 372 A.—Limitation Act, 1877, Section 5.*

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3. *Execution of decree—Attachment—Objection to attachment dismissed for default—Power of Court to restore such application to the file—Remedy of objector—Procedure—Civil Procedure Code, 1882, Sections 103, 278, 623, 647—Revision in Civil cases—Chief Court's powers of revision—Practice—Punjab Courts Act, 1884, Section 70.—Held, that the procedure prescribed for original suits by the Code of Civil Procedure does not apply to execution proceedings under Chapter XIX, and accordingly the remedy provided by Section 103 of the Code is not open to an objector whose objections under Section 278 to an attachment of certain property in execution of decree owing to his absence on the date fixed for hearing have been dismissed in default.*

When a person making an application within Chapter XIX fails to prosecute it, the Court must dispose of it by dismissing it in default, and in such cases the objector is only entitled to make a fresh application to obtain his relief if he is not otherwise barred, but when such an application has been disposed of on the merits the Court cannot entertain another of the similar nature or can alter or set aside its order except on review under Section 623, the provisions of which do apply to such proceedings.—*COATES v. KASHI RAM* 76

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Payment of debt to representative of deceased person—Discharge—Right of executors of the deceased to ignore such payment—Notice of claim—Duty of executors—Negligence, effect of—

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EX PARTE DECREE.

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1. *Distinction between gifts inter vivos and wills among Punjab agriculturists.*

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2. *Oral gift of immovable property creating charitable trust—Indian Trust Act, 1882, Section 5—Locus standi of third parties to contest gift.—Held, that a gift of immovable property creating a public charitable trust does not fall within the purview of the Trust Act, 1882, and that therefore it is not essential that it should be in writing signed by the author of the trust or the trustee and registered. Held, also, that when such a gift is upheld by the donor in Court, third parties cannot contest the donee's title.—SANTAN DHARM SAKHA, HOSHIARPUR, v. MUSAMMAT SOBHI* 75

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1. *Marriage of a minor Hindu widow by chadar andazi—Consent of lawful guardian to such marriage necessary—Presumption of legality of marriage—Khatris of Lahore—Act XV of 1856.*

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Among non-agricultural Hindus a declaration by deed coupled with previous and subsequent treatment without the performance of any ceremonies is sufficient to constitute an adoption valid.— <i>MANGTU v. CHUNI LAL</i>	51
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2. <i>Hindu Law—Inheritance—Exclusion of nephew by daughter's son—Custom—Hindu zargars of Dagshai.</i> —In a case the parties to which were non-agricultural Hindu zargars trading at Dagshai who had migrated from the Saharanpur District, held, in the absence of a special custom to the contrary, that in matters of succession they were governed by the ordinary Hindu Law, and that daughter's sons were consequently entitled to succeed in preference to nephews.— <i>BARU v. MAKHAN</i> ...	61
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<i>Hindu Law—Marriage of a minor Hindu widow by chadar andazi—Consent of lawful guardian to such marriage necessary—Presumption of legality of marriage—Khatris of Lahore—Act XV of 1856.</i> —Held, that among high caste Hindus, residents of cities, where a Hindu widow re-marries and the parties to such marriage (claiming to take advantage of the provisions of the law enunciated by Act XV of 1856), have gone through the form of marriage known as <i>chadar andazi</i> with the full intention of constituting their union into a full and complete legal marriage and do in fact thereafter live as husband and wife, no interpretation of Hindu Law or custom forbidding such re-marriage can avail to prevent such persons from contracting a legal marriage or is relevant to show that such a marriage is invalid, but in this case where the widow was a minor when the marriage was alleged to have been contracted, and no proper consent by her legal guardians had been given and she herself repudiated the alleged marriage, held that the alleged marriage was not a legal and valid marriage binding her.	
Although among high caste Hindus it is essential to the <i>factum</i> of a marriage that certain rites and ceremonies should be performed without which the relationship between the parties does not constitute a marriage valid, it is not necessary for the validity of a marriage by a Khatri widow that all the usual ceremonies which have to be performed in the case of a Khatri girl on her first marriage should be performed, and in such cases if the parties go through such ceremonies as they can reasonably arrange for, and clearly and unequivocally express their intention to enter into the marriage relation with each other, and as a fact thereafter live together as husband and wife, such a union is a valid marriage.— <i>LAL CHAND v. MUSSAMMAT THAKAR DEVI</i>	49

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1. *Suit by pauper—Application for leave to sue in forma pauperis—Subsequent payment of Court-fees after period of limitation—Date of institution of suit.*

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2. *Plaint insufficiently stamped—Payment of requisite Court-fee after the expiry of limitation allowed for the suit—Plaint when deemed to have been presented—Date of institution of suit.*

See *Limitation Act*, 1877, Section 4, No. 2 74

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Omission to settle issues.

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JOINT PROPERTY.

Partition—Suit to enforce a right to share in joint family property—Valuation for purposes of jurisdiction and Court-fee—Court Fees Act, 1870, Section 7 (iv) (b)—Suits Valuation Act, 1870, Section 8.

See *Partition* 28

JURISDICTION.

1. *Suit against ruling chief—Institution of suit without obtaining the consent of Governor-General in Council—Waiver by defendant of objection to consent—Effect of such waiver.*

See *Civil Procedure Code*, 1882, Section 433... .. 40

2. *Partition—Suit to enforce a right to share in joint family property—Valuation for purposes of jurisdiction and Court-fee—Court Fees Act, 1870, Section 7 (iv) (b)—Suits Valuation Act, 1870, Section 8.*

See *Partition* 28

3. *Res judicata plea of—Competency of inferior Court to enquire the jurisdiction of superior Court which passed the former decree—Consent to jurisdiction.*

See *Res judicata*, No. 3 37

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JURISDICTION—(concla).

4. *Suit for a declaration that the defendant is not the lawful wife of the plaintiff—Jurisdiction of Civil Court to entertain such a suit when an order for maintenance passed under Section 488 of the Criminal Procedure Code is in force against the plaintiff.*

See Specific Relief Act, 1877, Section 42 26

5. *Jurisdiction—Place of suing—Suit to recover money paid in Delhi on hundis sent by defendants to Delhi and there accepted and paid by the plaintiff—Civil Procedure Code, 1882, Section 17.—The plaintiff, a banker in Delhi, remitted Rs. 5,000 from Delhi to Ajmere at defendants' request and received from the defendants hundis drawn on their firm at Bombay in satisfaction of this loan which were subsequently dishonoured and yielded no return. The plaintiff thereupon filed a suit in Delhi and claimed to be reimbursed. The Delhi Court declined jurisdiction, holding that as the hundis were made payable at Bombay the Court there alone had jurisdiction to hear the suit.*

Held, that under the provisions of Section 17, Civil Procedure Code, the Delhi Court had jurisdiction to entertain the suit. As the plaintiff expended money on defendants' behalf at Delhi he might with reference to the ordinary application of Section 49 of the Contract Act naturally expect to be reimbursed there, and the fact that the defendants gave him hundis on Bombay which had been accepted in Delhi made no real difference.—MINA MAL v. NANAK MAL 10

6. *Jurisdiction—Place of suing—Consent to jurisdiction—Waiver—Civil Procedure Code, 1882, Sections 17, 20.—Held*, that, where the cause of action in a suit had not arisen within the jurisdiction of the Court in which a suit was instituted and only one of several defendants resided within that jurisdiction and no permission for the institution had been obtained in accordance with the proviso to Section 17 of the Code of Civil Procedure, the non-resident defendant, who objected to the jurisdiction in their written statements, could not be held to have acquiesced in that jurisdiction by reason of their failure to apply under Section 20 of the Code.—NAND LAL v. GOPAL SAHAI 27

JURISDICTION OF SMALL CAUSE COURT.

1. *Suit to recover money spent in connection with the guardianship of a minor—Suit relating to a trust—Jurisdiction of Small Cause Court.*

See Small Cause Court Act, Article 18 58

2. *Small Cause Court suit—Munsif trying case withdrawn from small Cause Court—Finality of order of Munsif—Civil Procedure Code, 1882, Section 25.*

See Small Cause Court suit.

LIMITATION ACT, 1877.

SECTION 4—EXPLANATION.

1. *Suit by pauper—Application for leave to sue in forma pauperis—Subsequent payment of Court-fees after period of limitation—Date of institution of suit.—An application for leave to sue as a pauper to set*

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aside an auction sale in execution of a decree was presented within the prescribed period allowed by Article 12 of the second Schedule to the Limitation Act. The defendant disputed the alleged pauperism, and pending the enquiry on that question the plaintiff paid into Court the amount of stamp duty required for the suit. The defendant pleaded limitation, as at the time the Court-fees was paid the suit was beyond time.

Held, that the suit was not barred. It should be deemed to have been instituted from the date the plaintiff filed his application for leave to sue as a pauper and not when he paid in the necessary Court-fee.—**RAJA RAM v. TILOK CHAND** 59

2. *Limitation Act, 1877, Section 4, Explanation—Plaint insufficiently stamped—Payment of requisite Court-fee after the expiry of limitation allowed for the suit—Plaint when deemed to have been presented—Date of institution of suit—Civil Procedure Code, 1882, Section 54.*—A suit for pre-emption was filed within the prescribed period of limitation. Subsequently it was discovered that the plaint had been insufficiently stamped and in accordance with the provisions of Section 54, Civil Procedure Code, the plaintiff was directed to supply the requisite Court-fee within a fixed time. This order was complied with by the plaintiff at a time when the period of limitation allowed for the suit had expired. The defence contended that the suit was barred by limitation as the deficiency in Court-fee payable on the plaint had not been paid up within the period of one year from the date on which the cause of action arose.

Held, that the suit was not barred. The date of the institution of the suit for purposes of limitation should be taken from the date of the presentation of the plaint and not from the date on which the requisite Court-fee were subsequently put in.—**TARA SINGH v. MUHAMMAD**... .. 74

SECTION 5.

1. *Execution of decree—Death of decree-holder—Abatement of execution proceedings—Admission of application to set aside abatement after time—Sufficient cause—Civil Procedure Code, 1882, Sections 365, 366, 371, 372 A.*

See *Civil Procedure Code, 1882, Section 365* 39

2. When an appeal is filed after it is time-barred and the appellant desires to take the benefit of the provisions of Section 5 or 5 (a) of the Limitation Act, the cause of the delay should be stated at the time the appeal is filed.—**C. v. C. AND B.** 22

ARTICLE 10.

Where a plaintiff has to seek to enforce his right of pre-emption against the transferee of an original vendee the provision of the Limitation Act applicable is Article 10 of the second schedule to the Limitation Act. **NAHI BAKSH v. FAKIR MUHAMMAD** 25

ARTICLE 91.

1. *Suit by a reversioner for possession of immovable property—Defendant in possession under will made by testator without title—Reversioner not barred by reason of his having failed to contest the will within three years.—Held*, that a suit by a reversioner to recover

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possession of immovable property in the hands of a defendant under an alleged will cannot (where the testator had no power to dispose of the property by will) be barred by reason of his (reversioner) having failed to contest the validity of such will within a period of three years. *HAYAT MUHAMMAD v. ALA BAKHS* 19

2. A suit by a reversioner of a childless male proprietor governed by Customary Law for a declaration of the invalidity of an alienation made by him as respects such reversioner's interest is not governed by Article 91. *DHERU v. SIDHU* 56
F. B.

ARTICLE 118.

Alienation by Jat proprietor—Gift in favour of sister's son—Suit by a reversioner to declare the gift invalid and not to be binding after the donor's death—Donee selling up his own adoption as a bar to the suit—Limitation Act, 1877, Schedule II, Article 118.—Held, that the term "adoption" in Article 118 of Limitation Act includes a customary appointment of an heir, and that the failure to sue within the period provided by that Article for a declaration that an alleged adoption was invalid or had never taken place, is fatal to a suit in which the validity of such adoption comes into question.

The knowledge of the factum of an adoption by the father or ancestors of the reversioner objecting to it, and his or their omission to sue within limitation prevents the reversioners from again raising the question of its invalidity. *BHUPA v. NAGAHIA* 68

ARTICLE 120.

1. *Public Company—Suit by liquidator for money due to the Company in respect of unpaid calls on shares—Limitation.*

See *Public Company, No. 1.* 70

2. It is not necessary for the reversioner of a holder of ancestral agricultural land to sue during his lifetime for a declaration of the invalidity of an alienation made by him as respects such reversioner's interest, and in the event of his failing to do so, such reversioner is not precluded from suing for possession on the death of the alienor after the lapse of the period prescribed for such declaratory suits.

The proper limitation for a declaratory suit of this nature is six years under Article 120 of the Limitation Act. *DHERU v. SIDHU* ... 56
F. B.

ARTICLE 141.

And Articles 142, 144—Limitation—Suit by reversioner on death of widow—Possession adverse to the female adverse to the reversioner.—Held, that in the Punjab adverse possession of a widow's estate by a trespasser during her life, no matter whatever the circumstances may be by which the adverse possession was obtained and continued, cannot be adverse against a reversioner or an effectual bar to his claim, and that limitation will begin to run against such reversioner only from the death of the female under Article 141 of Act XV of 1877, and not from the date of the commencement of such adverse possession. *RULIA v. RULIA* 41

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ARTICLE 144.

And Articles 91, 120, 140, 142, Limitation—Alienation of ancestral immovable property by sonless proprietor—Suit for possession by collaterals—Period of limitation applicable—Starting point of limitation—Held, by the Full Bench,—

(1). It is not necessary for the reversioner of a holder of ancestral agricultural land to sue during his lifetime for a declaration of the invalidity of an alienation made by him as respects such reversioner's interest, and, in the event of his failing to do so, such reversioner is not precluded from suing for possession on the death of the alienor after the lapse of the period prescribed for such declaratory suits.

(2). The proper limitation for a declaratory suit of this nature is six years under Article 120 of the Limitation Act.

(3). In the case of a gift of ancestral agricultural land by a sonless proprietor to which the Punjab Limitation Act does not apply, a suit by the heirs for possession is maintainable at any time within twelve years after the death of the donor. *DHERU v. SIDHU* 56

F. B.

ARTICLE 151.

See *Appeal*, No. 3 22

LIS PENDENS.

Lis pendens—Alienation of property pending suit relating thereto—Transfer of Property Act, 1882, Section 54.—Held that dealings with the property in suit effected after notice of suit brought in the Court of first instance and before the decision in appeal by the final Court of appeal, at whatever time between these two periods they may occur, are dealings effected pendente lite and subject to the doctrine of lis pendens.

HAKIM SINGH v. CHARN DAS 80

LOCUS STANDI OF AFTER-BORN SON.

Alienation by Jat proprietor without male issue at the date of the alienation—Right of after-born son to contest such alienation on the ground of necessity.

See *Custom—Alienation*, No. 8... .. 55

LOCUS STANDI OF THIRD PARTIES.

Oral gift of immonable property creating charitable trust—Trust of immovable property—Indian Trust Act, 1882, Section 5—Locus standi of third parties to contest gift.

See *Trust* 75

M.

MAHANT.

Liability of Religious Institution for debts incurred by Mahant—Duty of lender when advancing money to heads of Religious Institutions—Necessity.

See *Religious Institutions* 45

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MARRIAGE.

No.

1. *Betrothal—Barter of one girl in marriage for another—Breach of promise of marriage—void agreement—Public policy—Measure of damages.*
See *Contract Act, 1872, Section 23* 50
2. *Marriage of a minor Hindu widow by chadar andazi—Consent of lawful guardian to such marriage necessary—Presumption of legality of marriage—Khatris of Lahore—Act XV of 1856.*
See *Hindu Law, Marriage* 49
3. *Declaratory decree—Marriage—Suit for a declaration that the defendant is not the lawful wife of the plaintiff—Jurisdiction of Civil Court to entertain such a suit when an order for maintenance passed under Section 488 of the Criminal Procedure Code is in force against the plaintiff—Specific Relief Act, Section 42.—Held, that a suit by a person against whom an order for maintenance in favour of defendant has been made by a Criminal Court, under Section 488, Criminal Procedure Code, lies in a Civil Court for a declaration that the defendant is not his wife. MUSSAMMAT BAKHAN v. ALA BAKHSH* 26

MINOR.

1. *Lease of a portion of the property by guardian—Inability of minor to claim pre-emption—Estoppel.*
See *Estoppel* 2
2. *Marriage of a minor Hindu widow by chadar andazi—Consent of lawful guardian to such marriage necessary—Presumption of legality of marriage—Khatris of Lahore—Act XV of 1856.*
See *Hindu Law, Marriage* 49
3. *Suit to recover money spent in connection with the guardianship of a minor—Suit relating to a trust—Jurisdiction of Small Cause Court.*
See *Small Cause Court Act, 1887, Article 18* 58

MISJOINDER.

- Joinder of plaintiffs—Persons jointly interested in a suit—Claims not antagonistic—Civil Procedure Code, 1882, Sections 26, 27, 31.*
See *Parties, No. 2* 38

MORTGAGE.

1. *Suit for possession under the terms of a registered mortgage deed, wherein in addition to that condition other clauses intended to operate by way of conditional sale existed—Application of Section 9 (3) of Punjab Alienation of Land Act to such cases—Duty of Appellate Court—Procedure.*
See *Punjab Alienation of Land Act, 1900, Section 9, No. 1* 20
2. *Suit for possession under the terms of a mortgage-deed containing clauses intended to operate by way of conditional sale—Duty of Civil Court under Section 9 (3) of the Alienation of Land Act.*
See *Punjab Alienation of Land Act, 1900, Section 9, No. 2* 91

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MORTGAGE—contd.

3. *Mortgage—Conditional sale—Foreclosure—Regulation XVII of 1806, Section 7—Validity of notice of foreclosure.*—It is essential to the validity of a notice of foreclosure under Section 8 of Regulation XVII of 1806, that it shall inform the mortgagor that he must within the year redeem the property in the manner provided for by Section 7 of the Regulation, in a case where the notice issued was headed "*application for issue of a notice of foreclosure under Sections 7 and 8 of Regulation XVII of 1806,*" and notified "*that if you shall not redeem the said property in the manner provided for in the foregoing section of the said Regulation.*" Held, that the omission to specify Section 7 was a fatal defect to the validity of the notice, as there was no notice which of the two sections mentioned in the heading was referred to. *BAM CHAND v. SANDAL KHAN* 21

4. *Mortgage—Effect of payment of prior mortgage by subsequent incumbrancer as against intermediate charge.*—K, N and G were joint owners of certain land, K's share being half and the share of N and G being half. In 1887 they mortgaged half of their holding to M. In 1889 K created a further charge in favour of M on his own quarter share already under mortgage. In 1900 M obtained a decree against K, N and G for possession of the land mortgaged on the condition that the land would be released on payment of Rs. 650. K mortgaged a portion of his property for Rs. 700 to B who deposited Rs. 650 in the executing Court to the credit of M, who took the money out of Court without prejudice to his right under the second mortgage. Subsequently K having failed to meet his liabilities under the second mortgage of 1899, M instituted the present suit for possession and impleaded B as a co-defendant and claimed priority over B's mortgage which was of a subsequent date. B pleaded that as he had paid off the first mortgage he could now use it as a shield against all the subsequent incumbrances.

Held, that, as B had notice of the existence of the prior and mesne mortgages before the execution of his mortgage, no equities arose in his favor, and the result of the redemption of the prior mortgage being that his mortgage was subject only to the mesne mortgage, he was not entitled to use the prior mortgage as a shield against the mesne mortgage. *BAGGA MAL v. MOTI RAM* 32

5. *Mortgage—Conditional sale—Regulation XVII of 1806—Suit for possession—Duty of plaintiff to prove strict compliance with conditions—Absence of proof of previous demand before issue of notice of foreclosure.*—In a suit for possession after foreclosure of a mortgage by conditional sale under Regulation XVII of 1806, it appeared that there was no mention in his plaint by the plaintiff, nor any proof on the record that he had made a demand for payment before issue of the notice, but in the application for the issue of notice itself, it had been stated that several demands had been made. The defendant having taken no objection in the lower Courts, no issue was framed on the point. On the claim being decreed by the lower Courts, the defendant applied for revision under Section 70 (b) of the Punjab Courts Act, and objected to the decree on other grounds. The objection as to demand was not entered in the written application, but taken before the Judge in Chambers, who permitted it to be raised.

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Held, that as a demand prior to notice was essential to its validity, and required to be clearly established, the defendant was competent to rely upon it, even at that stage, but that the failure of the plaintiff to prove demand was excusable, and under the special circumstances it would not be just to decide that the notice was invalid on that ground without giving plaintiff an opportunity to rectify his omission. *MALLA v. RALLIA RAM* 71

6. *Mortgage—Mortgage of common holding—Part of mortgage land already heavily encumbered—Remedies of mortgagee.*—A, being in possession of a part of the common holding, mortgaged certain specific portions out of it to B. Subsequently the mortgagee, being deprived of his security on account of the mortgagor's title being defective and the existence of a prior mortgage, claimed to have his security made good out of the remainder of the common land forming part of the mortgagor's share.

Held, that as the mortgagee was deprived of his security by the wrongful act of the mortgagor, he was entitled to have his security made good to him out of the common holding in possession of the mortgagor. *SUNDAR SINGH v. NATHA* 89

MUHAMMADAN LAW—INHERITANCE.

Custom—Inheritance—Shia Sayads of Umballa City—Punjab Laws Act, 1872, Section 5—Muhammadan Law.—In a suit the parties to which were non-agriculturist Shia Sayads residing in the Kazi *mohalla* of Umballa City and owning little land outside, *held*, that the plaintiffs had failed to establish that they were governed by agricultural custom under which collaterals related in the fifth decree have a right to succeed to non-ancestral house property situated in the Umballa City or Cantonments to the exclusion of a grandmother succeeding her grandson, or a married daughter succeeding her mother.

Held, further, that in matters of succession under dispute the parties were governed by the Muhammadan Law and being Shia Sayads by the *Imamia Code*.

As the Punjab Laws Act gives equal protection to those governed by their personal law, as well as to those governed by custom, there can be no legal presumption in any case coming before a Court in the Punjab that it is to be governed by custom rather than the personal law of the parties. But in every case where a custom is set up, it is the duty of the person alleging it to prove where it is not admitted that it exists and is applicable to the points in issue. *MUHAMMAD HUSSAIN v. SULTAN ALI* 54

N.

NECESSITY.

See *Custom—Alienation*, Nos. 3, 8, 12.

For *alienation by heads of religious institutions*.

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NEGOTIABLE INSTRUMENTS ACT, 1881.	
SECTION 64.	
<i>Promissory Note—Suit on, not presented for payment—Cause of action—Negotiable Instruments Act, 1881, Section 64.—Held, that under the provisions of the exception to Section 64 of the Negotiable Instruments Act, where a Promissory Note is payable on demand, and not on demand at sight, no presentment is necessary in order to charge the maker or his legal representative. HARI SINGH v. NARAIN SINGH</i> ...	60
NOVATION.	
<i>See Contract Act, 1872, Section 62</i>	7
OATHS ACT, 1873.	
<i>Agent's authority to bind client by oath of opposite party—Power of principal to withdraw after other party has agreed to take the oath.</i>	
<i>See Principal and Agent, No. 2</i>	85
SECTION 12.	
<i>Party agreeing to be bound by oath of other party—Power to withdraw after other party has agreed to take the oath—Effect of such withdrawal—Decision on merits.—Although a party to a suit who agrees to be bound by the oath of the other party is not entitled to withdraw after the other party has expressed his willingness to take the oath required, all that the Oaths Act of 1878 prescribes for the contingency of the party agreeing eventually withdrawing and preventing the other party from taking the proposed oath, is that the fact of the agreement to be bound by the oath and any reason which may be assigned for the subsequent withdrawal should be recorded by the Court as part of the proceedings, and the suit should be decided on the merits, allowing due weight to the presumption arising from that refusal after considering the reasons assigned. AMIR CHAND v. GOBIND SAHAI</i>	5
OCCUPANCY RIGHTS.	
<i>Occupancy rights—Sale of right of occupancy under Section 6 of the Punjab Tenancy Act, by landlord in execution of a money decree against the tenant—Punjab Tenancy Act, 1887, Sections 5, 56.—Held, that by Section 56 of the Punjab Tenancy Act, rights of occupancy under any other section than Section 5 are absolutely protected from attachment and sale in execution of decree, not only against third parties but equally against the tenant's landlord. GANGA RAM v. KARAM DIN</i> ...	82
OCCUPANCY TENANT.	
<i>Sale of whole village to stranger—Pre-emption—Suit by occupancy tenants in the village—Punjab Laws Act, 1872, Sections 10, 12—Village community.</i>	
<i>See Pre-emption, No. 15</i>	66
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PARDANASHIN LADY.	
<i>Execution of deed by Pardanashin in favour of a person who is in relation of active confidence—Undue influence.</i>	
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PARTIES.

1. *Effect of adding a new defendant to suit.*—Section 22 of the Limitation Act applies even where a Court of its own motion adds a party to a suit. *NAHI BAKHSH V. FAKIR MUHAMMAD* 25

2. *Misjoinder—Parties—Joinder of plaintiffs—Persons jointly interested in a suit—Claims not antagonistic—Civil Procedure Code, 1882, Sections 26, 27, 31.*—Certain Jats sued for a declaration that the land in suit was their property, alleging that at Settlement the defendants had been wrongly entered as proprietors thereof. Subsequently certain butchers, stating themselves to be proprietors of part of the land, applied to be made co-plaintiffs. Finally a joint application to the same effect was made by the Jat plaintiffs and the butchers, in which it was stated that they owned specified portions of the land. The defence pleaded misjoinder. The objection being overruled, the butchers were added as co-plaintiffs. The plaint was not amended, but fresh pleas were taken and issues framed. After enquiry into the merits, the first Court gave a joint decree in plaintiff's favour. On appeal the Divisional Judge, considering that the impleading of the butchers as plaintiffs was wholly illegal and improper and had been effected at the wish and with the consent of the Jat plaintiffs, dismissed the suit.

Held, that as the rights of Jats and the butchers were not antagonistic and their causes of action were not distinct within the meaning of Section 31, Civil Procedure Code, but were common to all of the plaintiffs, and as no inconvenience had been caused to defendants by their joinder which had not in any way prejudiced the defence, the suit was not bad for misjoinder.

Semble: Where two sets of plaintiffs having distinct causes of action sue together, such action is impliedly forbidden by the second paragraph of Section 31 of the Code of Civil Procedure, and the suit is bad for misjoinder; but even in such case it is not just for a Court to dismiss the suit on that ground, the proper course being for the plaint to be returned for amendment, so that the plaintiffs might elect which set of plaintiffs should proceed with the suit. *ALAH BAKHSH V. SADIQ ALI* ... 38

3. *Non-joinder of parties—Effect of objection as to non-joinder not taken in time—Civil Procedure Code, 1882, Section 34.*—*Held*, that objection in respect of non-joinder of parties not raised at the earliest possible opportunity must be deemed to have been waived by the defendant. *ANDERSON V. DELHI COTTON MILLS COMPANY, LIMITED* ... 69

PARTITION.

Partition—Suit to enforce a right to share in joint family property—Valuation for purposes of jurisdiction and Court-fee—Court Fees Act, 1870, Section 7 (iv) (v)—Suits Valuation Act, 1870, Section 8.—*Held*, that for purposes of Court-fees in a suit to enforce a right to share in joint family property by partition and for the delivery of the possession to the plaintiff of his share, the value of the suit is the amount at which the plaintiff values his share. In such cases the value as determinable for the computation of Court-fees and the value for purposes of jurisdiction are identical. *HARI CHAND V. JIWAN MAL* 28

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No.

PARTNERSHIP.

1. *Suit for dissolution of partnership—Sale of outstandings before the business was dissolved—Validity of such sale—Civil Procedure Code, 1882, Section 215.*—Under Section 215, Civil Procedure Code, a Court trying a suit for dissolution of partnership has no power to sell outstandings or to take any of the proceedings indicated in that section until it has passed an order dissolving the partnership, therefore where previous to the passing of the preliminary decree dissolving the partnership the Court sold a large portion of the outstandings and then dismissed the suit for want of prosecution, *held*, that the sale was invalid and *ultra vires*. *MUL CHAND v. PIYARE LAL* 23

2. *Partnership—Dissolution of partnership—Liability of retired partner for debts contracted after dissolution—Contract Act, 1872, Sections 245, 264.*—*Held*, that when it is sought to charge a party with liability as a partner many years after the dissolution of the partnership by a person who has had no dealings with the original firm prior to its dissolution, and was not even aware that the party sought to be charged was a partner therein, and where notices of the dissolution were given to the *artis* of the firm, and there was nothing to show any attempt at concealment of the change in the constitution of the firm, the mere fact that the continuing partner was allowed to carry on business in the old firm's name, which did not disclose the identity of the retired partner or the maintenance of a joint responsibility in a specific contract, would not render the retired partner liable to such person for debts contracted by the firm long after his retirement therefrom.

Section 264 of the Contract Act does not cover the case of a person dealing with a firm for the first time after a change from its original constitution, so as to make a partner who had already retired liable. *CHAND MAL v. GANGA RAM* 78

PAUPER.

Suit by pauper—Application for leave to sue in forma pauperis—Subsequent payment of Court-fees after period of limitation—Date of institution of suit.

See *Limitation Act, 1877, Section 4, No. 1* 59

PLAINT.

Plaint insufficiently stamped—Payment of requisite Court-fee after the expiry of limitation allowed for the suit—Plaint when deemed to have been presented—Date of institution of suit.

See *Limitation Act, 1877, Section 4, No. 2* 74

PRE-EMPTION.

1. *Custom—Pre-emption—Sale of property not used as residential house—Sale in lieu of money plus favor and past services—Guardian of minor—Lease of a portion of the property by guardian—Inability of minor to claim pre-emption—Estoppel—Punjab Laws Act, 1872, Sections 9, 11.*—Plaintiff sued for pre-emption in respect of the sale of a large property known as *Pari Mahal* in the city of *Lahore*, consisting at the time of sale of an enclosure with shops outside and of a number of small huts

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inside, which were generally occupied by blacksmiths, carpenters and cow and goat herdsmen with their cattle. The claim was based on the ownership by plaintiff of a portion of the property adjoining. Amongst other defences the defendant pleaded :—

- (i) that the plaintiff having through his guardian taken a portion of the property in suit on lease was estopped from making the claim ;
- (ii) that part of the consideration for the transfer consisted of a favour and past services and that consequently the transfer did not amount to a sale ;
- (iii) that the property was an enclosure consisting of shops, etc., and being of the nature of a *katra* or *sarai* the custom of pre-emption did not extend thereto ;

Held—

- (i) that the mere fact that the guardian of the minor plaintiff temporarily leased a small portion of the property in suit at a date between the transfer and institution of the suit did not amount to an estoppel ;
- (ii) that an assignment of immovable property for money plus favour and past services was a sale within the meaning of Section 9, Punjab Laws Act, and that a plaintiff in such a suit would have to pay the market value of the property ;
- (iii) that the plaintiff's claim must be dismissed on the ground that he had failed to prove that by local custom a right of pre-emption on sale of property which had not been used as residential premises for several centuries and which was of the nature of a *sarai* or *katra* existed. *KISHEN SINGH v. JAIKISHEN DAS* 2

2. *Pre-emption—Village divided into panas and thullas—Punjab Laws Act, 1872, Section 12 (c)—Construction of Wajib-ul-arz.*—In the village of Kharkhoda, in the Sampla Tahsil of the Rohtak District, which was divided into two *panas* and each *pana* into two *thullas*, the plaintiffs claimed pre-emption on the ground that their land and the land in dispute although in different *thullas* was in the same *pana*, whereas the vendees owned land in the other *pana* only. The vendees resisted the claim on the ground of a special custom contained in the *Wajib-ul-arz* of the village made in 1858 which was to the effect "that the alienor will alienate first to his brothers and near relations, and in case of their declining to the proprietors of the same *thulla* and in case the aforesaid persons decline the alienor is at liberty to alienate to any one he pleases."

Held, that the provisions of Section 12 (c) of the Punjab Laws Act applied, that the *panas* were sub-divisions within the meaning of that section and that the pre-emptive right of the plaintiffs were superior to that of the vendees. *HARNAM v. MUHAMMAD AMAN ALI* 3

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No.

PRE-EMPTION—*contd.*

3. *Civil Procedure Code, 1882, Section 316—Sale of immovable property in execution of decree—Sale certificate—Title of auction purchaser who has not obtained a certificate—Pre-emption—Right of pre-emptor to maintain suit before a certificate has been granted—Registration of sale certificate—Registration Act, 1877, Section 17 (o).*—At a sale in execution of a decree the defendant purchased certain immovable property; the sale was confirmed, but at the purchaser's own request the certificate was not drawn up and given to him, although a draft had been prepared. The plaintiff sued for pre-emption, the defence pleaded that inasmuch as the certificate of sale had not been granted to him under Section 316, Civil Procedure Code, the suit was premature.

Held, that under the circumstances the confirmation of sale by the executing Court is sufficient to confer a complete title upon an auction purchaser, and that a party purchasing property subject to pre-emption at a sale held in execution of a decree cannot defeat the right of a pre-emptor by asking the Court to omit performance of its statutory duty to grant a certificate after confirmation of the sale. Clause (a) to Section 17 of the Registration Act expressly exempts a sale certificate granted to the purchaser of immovable property sold by public auction by a Civil or Revenue Officer. *AJUDHIA PERSHAD v. CHANDAN*

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4. *Custom—Pre-emption—Plaintiff and defendant both claiming on ground of vicinage—Burden of proof.*—In a suit for pre-emption of a house situate in the city of Delhi on the ground of a superior vicinage, inasmuch as the pre-emptor's house and the house sold adjoined on one side and opened into the same lane, while the vendee's house adjoined the house sold in part on the back and opened into a different lane, the plaintiff in order to prove his claim produced two witnesses, who could give no instances in support of their statement, *held*, that the plaintiff had failed to establish a custom under which he had a superior right to claim pre-emption against the vendee. *BAHU MAL v. SARDAR SINGH* ...

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5. *Pre-emption—Waiver of right in favour of stranger—Subsequent assertion of right against person with right superior to original vendee—Parties—Adding new defendant to suit—Civil Procedure Code, 1882, Section 32—Limitation—Limitation Act, 1877, Articles 10 and 120.*—On 4th March 1898, G sold to F the land now in dispute. The deed was attested as a witness by one J, who was the lambardar of the parties' village. On 24th February 1899, N instituted the present suit for pre-emption against the vendor and purchaser. On 13th March 1899, the vendee stated that he had sold the land to J on 23rd January 1899, thereupon the Court added J as co-defendant, who pleaded that the suit against him was barred by time, and that his right of pre-emption was equal to that of plaintiff.

Held, that attesting the deed and taking an active part in its registration amounts to a distinct waiver by J of his right to pre-emption, and having once waived his right with respect to the bargain, J was estopped from asserting it against the present pre-emptor, whose claim to pre-emption was superior to that of the original vendee.

The references are to the Nos. given to the cases in the "Record."

No.

PRE-EMPTION—*contd.*

Held, also, that as the plaintiff in order to succeed against J notwithstanding his, (J's) waiver, if his purchase was a genuine one, had to seek to enforce his right of pre-emption against him, the provision of the Limitation Act applicable was Article 10 of the second Schedule; and although the suit against F, the original vendee, was instituted within the period prescribed by that article, J having been added as a co-defendant three days after the period allowed, the suit should be held barred, unless the plaintiff could prove that the sale to J was fictitious. *NABI BAKHSH v. FAKIR MUHAMMAD* 25

6. *Custom—Pre-emption—Sale to a stranger—Acquisition of pre-emptor with superior right—Suit by a pre-emptor with inferior right against the stranger—Waiver of right—Acquiescence.*—Where pre-emptor with superior rights agreed with a vendee, who was a stranger, that in consideration of his receiving a portion of the property sold he would waive his objections to the sale, *held*, that as the transaction was equivalent to that of taking over only a portion of the original bargain or associating a stranger in the purchase, it was not permissible by law and could not therefore defeat the rights of other pre-emptors. *RALLA v. DYAL* 34

7. *Custom—Pre-emption—Andar Shahr Bazar, Peshawar—Vicinage—Burden of proof.*—*Found*, that the custom of pre-emption based on vicinage extends to a building site formerly occupied by a shop in the Andar Shahr Bazar, a sub-division of the city of Peshawar.

Although the existence of a custom of pre-emption in a particular sub-division, such as is referred to in Section 11 of the Punjab Laws Act, has to be established, instances in the neighbouring sub-divisions, though not of themselves sufficient to prove the existence of such a custom in that sub-division, are evidence of such existence. *SANT SINGH v. JAWALA SAHAI* 42

8. *Custom—Pre-emption in towns—Rival claimants—Vicinage—Preferential right—Burden of proof—Punjab Laws Act, 1872, Section 11.*—*Held*, that where rival claimants to the pre-emption of house property in towns assert superior right by vicinage, each has to prove his vicinage to be of a superior kind, and in such cases, if the plaintiff fails to establish a local custom under which he has a superior right against his rival claimant and the respective claimants' rights are found to be equal, preference must be given to him who has shown superior diligence by suing first. *RAHMAT ALI KHAN v. HAMID-UD-DIN* 43

9. *Custom—Pre-emption—Mohalla Kassaban, Ferozepore city—Effect of vendee's parting with his own property the title in which gave him the right of pre-emption—Punjab Laws Act, 1872, Section 11.*—*Held*, (1) that the city of Ferozepore is divided into sub-divisions within the meaning of Section 11 of the Punjab Laws Act; (2) that the custom of pre-emption as regards dwelling houses prevails in mohalla Kassaban which is such a sub-division; and (3) that the plaintiff had failed to establish that he had a superior right of vicinage to that of the vendee merely because his house is conterminous with that in suit to a greater length and opens on the same part of the common street as the latter.

The references are to the Nos. given to the cases in the "Record."

No.

PRE-EMPTION—*contd.*

A vendee, defendant, having rights of pre-emption on the ground of vicinage does not forfeit them if he parts with his own property through which he had the rights immediately after the purchase and can set up those rights in defence of his purchase. MUHAMMAD NAWAZ KHAN v. MUSSAMMAT BORO SAHIB 44

10. *Custom—Pre-emption—Right of, on mortgages—Wajib-ul-arz.*—Plaintiff claimed a right of pre-emption in respect of a mortgage of certain land situated in *mauza* Ghola, *tahsil* Zafarwal, and relied in support of his claim upon entries in the *Wajib-ul-arz* of 1855 of the village. The entries were to the effect—"Asl hakiyat kissiki rahn nahin. "Buwakt zarurat jo koi intikal apni hakiyat ka chahega hasb kimat "mukarrar zamindoran-i-dihot kurb jowar job tak hakiki wa hissadaran "patti ya dusri patti ke malik khawahan honge, hakiyat dar ko bai wa "rahn hakiyat ka shakhs ghair ke hath n hoga."—These were not repeated in any subsequent *Wajib-ul-arz*, and notwithstanding the fact that there had since been numerous mortgages the plaintiff had not shown a single instance where there had been an attempt to assert a right of pre-emption extending to mortgages in accordance with the provisions of the *Wajib-ul-arz*.

Held, that the entries in the *Wajib-ul-arz* of 1855, relating to the existence of an alleged custom, unsupported by instances of its having been ever exercised, and contradicted by the entries themselves which expressly mentioned that there had never been any instance, and that they had been made for future guidance, could not be deemed to be sufficient evidence of such a custom. UMRA v. HARA 46

11. *Custom—Pre-emption—Kot Abdulla Shah in Mozang District Lahore—Punjab Laws Act, 1872, Section 11.—Found*, that the custom of pre-emption prevails in *Kot Abdulla Shah*, a sub-division of the village of *Mozang* in the *Lahore District*. ALI BAKHSH v. MOHYA ... 52

12. *Pre-emption—Decree for pre-emption omitting to state consequence of non-payment of pre-emptive price within the time prescribed thereby for payment—Civil Procedure Code, 1882, Section 214.—Held*, that a pre-emption decree becomes void and inoperative if the pre-emptive price is not paid within the time prescribed for its payment in the decree. An omission in the decree of any order as to what would be the consequence of the decree-holder's default in payment of the pre-emptive money does not in any way affect the case. GURDIT SINGH v. HUKAM SINGH 53

13. *Custom—Pre-emption—Mauza Kotli Kanjran, Gurdaspur District—Relationship—Wajib-ul-arz.*—Plaintiff claimed a right of pre-emption of certain land situated in *mauza* Kotli Kanjran, *tahsil* Gurdaspur, arising out of a sale by defendants Nos. 2 and 3 in favour of defendant No. 1, on the ground of his relationship to the vendor, and based his claim upon entries in the *Wajib-ul-arz* of the village prepared in 1852. These entries were to the effect that no sale or mortgage of land had ever occurred in the village, and then prescribed that every co-sharer was thenceforward to be at liberty to mortgage or sell for necessity or to pay arrears of Government revenue, but that he should make the first offer of it to the *karabatian* and after that to

The references are to the Nos. given to the cases in the "Record."

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PRE-EMPTION—concl'd.

the co-sharers in the *patti*. The facts found were that, although there had been more than 51 sales in the village, in no case had the right of pre-emption based on relationship in accordance with the provisions of the *Wajib-ul-arz* been asserted or allowed.

Held, that no custom of pre-emption based on relationship had been proved to exist in the village. The entries in the *Wajib-ul-arz*, never having been acted on or the right exercised in accordance therewith, were not sufficient to establish the custom set up. *RAM SARAN DAS v. MULA SINGH* 64

14. *Custom—Pre-emption—Mauza Chhara, District Rohtak—Preferential right—Relationship—Burden of proof.*—In a suit for pre-emption of a house situate within the *abadi* of Chhara in the District of Rohtak, *held*, that under the terms of the *Wajib-ul-arz* of the village, the plaintiff, a Jat and a near agnate of the vendor, had a right of pre-emption superior to that of a *Mahajan* who was only a shareholder in the village.

Burden of proof that any existing custom has been incorrectly stated in a record of rights rests on the person making such assertion. *MAHA RAM v. RAM MOHAR* 65

15. *Pre-emption—Village owned by a single proprietor—Sale of whole village to stranger—Suit by occupancy tenants in the village—Punjab Laws Act, 1872, Sections 10, 12—"Village community."*—*Held*, that the expression "village communities" in Section 10 of the Punjab Laws Act, 1872, as amended by Act XII of 1878, is not used to denote a village community of the typical sort consisting of members of one family or one clan holding the village lands in common and dividing between them the agricultural land according to the custom of the village, but is used in a popular sense to denote a body of persons bound together by the tie of residence in one and the same village, amenable to the village customs and subject to the administrative control of the village officer.

A "village community" is not confined to the landowners in the village. Occupancy tenants are therefore members of a village community within the meaning of the Punjab Laws Act, and so are all persons in an inferior position who belong to the village, though they may be unconnected with the land and not entitled to any right of pre-emption under the Act. *RAHIM-UD-DIN v. REWAL* 66

P. C.

PRESUMPTION.

1. *Of power of testation where a power of gift is shown to exist.*

See *Custom—Alienation*, No. 6 48
F. B.

2. *Of legality of marriage.*

See *Hindu Law—Marriage* 49

3. *As to observation of formalities requisite to confer authority upon Directors of a Joint Stock Company.*

See *Public Company*, No. 2 81

The references are to the Nos. given to the cases in the "Record."

No.

PRESUMPTION—*conold.*

4. *Held*, that the ordinary presumption arising out of a recital in a registered bond "that when a bond is registered and its execution is "admitted by the defendant, the *onus* of proof of want of consideration "and of free consent not having been given, would lie on the party "seeking to get out of its effect," is modified where one party is in relation of active confidence, and that in such cases the *onus* of proving good faith, fair dealing and full and free consent lies on the party interested in upholding the transaction. *HOTI LAL v. RAM PIARI* ...

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PRINCIPAL AND AGENT.

1. *Principal and agent—Managing Agent and Company—Liability to account.—Held*, that the relationship between a Company and its Managing Agent being that of principal and agent, it is the duty of the latter to render proper accounts to the former. The fact that an Agent of a Company was paid by commission or was subordinate to the control of its Directors, or that he had delivered up to them all the account books of the Company, does not exonerate him from the liability to account. *ANDERSON v. DELHI COTTON MILLS CO. LD.* ...

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2. *Oaths Act, 1873—Agent's authority to bind client by oath of opposite party—Power of principal to withdraw after other party has agreed to take the oath.—Held*, that an agent holding a power of attorney authorizing him, amongst other things, "to take all kinds of proceedings in "connection with the case," was empowered to bind his principal by the oath of the opposite party under the Indian Oaths Act, and that his principal was not entitled, without showing good reasons for retracting it to withdraw the offer made on his behalf after the other party has expressed his willingness to take the oath required. *GANGA BISHEN v. MATNA* ...

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PROBATE AND ADMINISTRATION ACT, 1881.

Probate and Administration Act, 1881—Application of, to Sikhs, Brahmos and unorthodox Hindus—Will—Execution—Blanks in body of will.—Held, by the Privy Council—

- (i) That a Sikh is included in the term Hindu as used in the Probate and Administration Act of 1881.
- (ii) That a Sikh or Hindu by becoming a Brahmo did not necessarily cease to belong to the community in which he was born.
- (iii) That lapse from orthodox practices in matters of diet and ceremonial observance could not have the effect of excluding a Hindu or a Sikh from the category of Hindu in the Act, especially in the case of one who had been born within its purview and who had never become otherwise separated from the religious communion in which he was born.

Found, upon the evidence, that the testator had never become a professed Brahmo, and that the will had been duly executed and that there were no blanks in it at the time of its execution. *RANI BHAGWAN KAUR v. JOGENDRA CHANDRA BOSE* ...

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P. C.

The references are to the Nos. given to the cases in the "Record."

No.

PROMISSORY NOTE.

Suit on Promissory Note not presented for payment—Cause of action.

See *Negotiable Instruments Act, Section 64* 60

PUBLIC COMPANY.

1. *Managing agent and Company—Liability of managing agent to account to the Company.*

See *Principal and Agent, No. 1* 69

2. *Public Company—Suit by liquidator for money due to the Company in respect of unpaid calls on shares—Limitation—Limitation Act, 1877, Schedule II, Article 120.—Held, that the period of limitation applicable to a suit brought by liquidator of a Public Company to recover the unpaid amount of calls from a shareholder is six years from the date of default under Article 120 of the second Schedule to the Limitation Act.* HARCHAND RAI v. RANG LAL 70

3. *Public Company—Contract on behalf of Company—Directors and Officers—Warranty of authority—Duty of third parties to see that the Directors and Officers are acting within their authority—Presumption as to observation of formalities requisite to confer authority upon Directors.—Although any one dealing with a Joint Stock Company is bound to satisfy himself that the Agent or Director with whom he acts as representing the Company is acting within the powers which such Agent or Director might possess under the Articles of Association, it is not incumbent on him to ascertain whether the necessary formalities or proceedings have been held or performed requisite to confer such powers on such agent or Director, and therefore where the person dealing with a Company has satisfied himself that such dealings by an Agent or Director are amongst those which an Agent or Director might perform within the scope of the Company's Articles of Association and could be validly entered into by such persons duly empowered on behalf of the Company, and he finds an Agent or Director of the Company entering into such dealings on behalf of the Company, and acting as if he, the Agent or Director, had been duly empowered, he is entitled to infer the fact of the necessary authorisation to act and to maintain an action on account of damages caused by the Company's non-compliance with the terms of a contract made with him whether through his Agent or personally, and is not bound to enquire further whether as a matter of fact such representative of the Company has been so empowered by the Company, or that all the proceedings of the Company and its Directors have all been strictly regular.* THE KRISHNA MILLS CO., LD., DELHI, v. GOPI NATH 81

PUNJAB ALIENATION OF LAND ACT, 1900.

SECTION 9.

1. *Mortgage—Possession—Suit for possession under the terms of a registered mortgage-deed, wherein in addition to that condition other clauses intended to operate by way of conditional sale existed—Application of Section 9 (3) of Punjab Alienation of Land Act to such cases—Duty of Appellate Court—Procedure—Punjab Alienation of Land Act, 1900.—The plaintiff sued for possession as mortgagee of certain land by a*

The references are to the Nos. given to the cases in the "Record."

No.

PUNJAB ALIENATION OF LAND ACT, 1900—*contd.*

registered deed which contained a condition that plaintiff should take possession as mortgagee in the event of failure to pay certain instalments, but there were two other clauses in the deed which were intended to operate by way of conditional sale. The first Court gave a decree for possession without making any reference to the Deputy Commissioner under Section 9 (2) and (3) of the Punjab Alienation of Land Act, 1900. In appeal before the Divisional Judge it was urged that the deed should have been referred to the Deputy Commissioner and that course should now be taken by the Appellate Court. The Divisional Judge referred the following points for the decision of the Chief Court:—

- (1) Does Section 9 (3) of the Land Alienation Act apply to a case in which the plaintiff sues on a mortgage to which Section 9 (2) applies but does not sue to enforce the condition intended to operate by way of conditional sale?
- (2) Whether when the lower Court has wrongly neglected to refer the case to the Deputy Commissioner, the Appellate Court should pass over the irregularity?
- (3) Assuming that the Appellate Court should amend the irregularity of the lower Court, what form should that amendment take?

Held—

- (1) that Section 9 (3) apply, but in cases in which the plaintiff not only did not sue on the clause regarding conditional sale, but surrenders that condition altogether and agrees of his own motion to have it struck out, the mortgage would cease to be one including such a clause, and the reference to the Deputy Commissioner would be no longer necessary as there would be no mortgage before the Court coming within the purview of Section 9 (2);
- (2) that the provisions of Section 9 (2), (3) of the Punjab Alienation of Land Act are imperative, and if the first Court passed a wrong order it is clearly the duty of an Appellate Court to set it right;
- (3) that according to the provisions of Section 582, Civil Procedure Code, the Appellate Court should proceed in the same manner as a Court of first instance would proceed to decide the preliminary points noted therein, and thereafter if a reference to the Deputy Commissioner is still necessary under Section 9, it should be made either direct or through the lower Court, and in those cases where the exercise of his powers under the Alienation of Land Act by the Deputy Commissioner would not dispose of the case, the Civil Court making the reference should dispose of it after the Deputy Commissioner has discharged his duties in connection therewith. *NARAIN SINGH v. HAYAT*

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2. *Mortgage—Possession—Suit for possession under the terms of a mortgage deed containing clauses intended to operate by way of conditional sale—Duty of Civil Court under Section 9 (3) of the Alienation of Land*

The references are to the Nos. given to the cases in the "Record."

PUNJAB ALIENATION OF LAND ACT, 1900—*concl'd.*

Act.—*Held*, that notwithstanding the fact that a mortgagee holding a deed containing a condition intended to operate by way of conditional sale sues for possession only, the Civil Courts are bound in the first instance to refer the case to the Deputy Commissioner under the provisions of sub-section 3 of Section 9 of the Punjab Alienation of Land Act, and should not grant him the relief asked for, although he may be willing to surrender and agree, of his own motion, to have the condition for sale struck out. *BODH RAM v. FAIZ BAKHSH*

No.

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SECTION 16 (1).

Suit for a declaration that land belonging to an agriculturist is liable to attachment and sale.—*Held*, that Section 16 of the Punjab Alienation of Land Act does not prohibit the attachment in execution of a decree of the land belonging to an agriculturist, and that a decree-holder is entitled to claim a declaration that certain land is liable to attachment and to be thereafter dealt with as provided in Section 326, Civil Procedure Code. *BADAR DIN v. BURA MAL*

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PUNJAB COURTS ACT, 1884.

SECTION 9 (a).

Divorce—Dismissal by single Judge of application for dissolution of marriage—Appeal from such order of dismissal—Indian Divorce Act, 1869, Section 55.

See Appeal, No. 2

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SECTION 40.

Value of suit—"Decree involves directly some claim to, or question respecting property of, like value."

See Appeal, No. 4.

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SECTION 70.

See Revision.

PUNJAB LAWS ACT, 1872.

SECTION 5.

As the Punjab Laws Act gives equal protection to those governed by their personal law, as well as to those governed by custom, there can be no legal presumption in any case coming before a Court in the Punjab that it is to be governed by custom rather than the personal law of the parties. But in every case where a custom is set up, it is the duty of the person alleging it to prove where it is not admitted that it exists and is applicable to the points in issues. *MUHAMMAD HUSAIN v. SULTAN ALI*

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SECTION 9.

Sale in lieu of money plus favor and past services.—*Held*, that an assignment of immovable property for money plus favor and past services was a sale within the meaning of Section 9, Punjab Laws Act, and that a plaintiff in such a suit would have to pay the market value of the property. *KISHEN SINGH v. JAI KISHEN DAS*

The references are to the Nos. given to the cases in the "Record."

PUNJAB LAWS ACT, 1872—concl'd.

SECTION 10.

And Section 12—Pre-emption—Village owned by a single proprietor—Sale of whole village to stranger—Suit by occupancy tenants in the village—Village community.

See *Pre-emption*, No. 15 ... 66 P.C.

SECTION 11.

See *Pre-emption*, Nos. 1, 7, 8, 9, 11 ... 2, 42
43, 44

SECTION 12.

See *Pre-emption*, Nos. 2, 15 ... 3, 66

PUNJAB TENANCY ACT, 1887.

SECTION 6.

And Section 56—Sale of right of occupancy under Section 6 of the Punjab Tenancy Act by landlord in execution of a money decree against the tenant.

See *Occupancy Rights* ... 82

R.

REGISTRATION ACT, 1877.

SECTION 17 (o).

Registration of Sale Certificate.—Held, that clause (o) to Section 17 of Registration Act expressly exempts a sale certificate granted to the purchaser of immovable property sold by public auction by a Civil or Revenue Officer. *AJUDHIA PERSHAD v. CHANDAN* ... 9

SECTION 77.

Registration—Suit for compulsory registration of a document—Execution admitted but fraud and misrepresentation pleaded—Power of Court to inquire the validity of such document.—In a suit under Section 77 of the Registration Act where the defence had admitted the execution of a deed but pleaded that it was executed under fraud or misrepresentation and without free consent, held, that the plaintiff was entitled to the decree asked for. In suits under Section 77 of the Registration Act the Courts are only authorized to consider the question of execution, and have no authority to go into any matter affecting the validity of the document sought to be registered. *HAZURI MAL v. KUTAB-UD-DIN* ... 11

REGULATION XVII OF 1806.

See *Mortgage*, Nos. 3, 5. ... 21, 71

RELIGIOUS INSTITUTION.

Religious Institution—Liability of, for debts incurred by mahant—Duty of lender when advancing money to heads of religious institutions—Necessity.—Held, that it is not sufficient for persons who lend money to heads of religious institutions and desire to charge the institutions with liability to show that the purposes for which the loans are taken are

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RELIGIOUS INSTITUTION—*concl'd.*

necessary, but they must also show that they made inquiries and satisfied themselves that on the occasion on which they made the advance the loan was justified by the state of the institution's finances. GURMUKH SINGH *v.* SUNDER SINGH 45

REPRESENTATIVE OF DECEASED PERSON.

Payment—Payment of debt to representative of deceased person—Discharge—Right of executor of the deceased to ignore such payment—Notice of claim—Duty of executors—Negligence, effect of.—Held, that as no one is under legal obligation to pay debts due to the estate of a deceased person to any one claiming to be entitled to the effects of the deceased, except on the production of a probate, letters of administration, certificate or some authority to collect the debts due to the estate of the deceased, therefore a payment by a debtor to the widow of his deceased creditor who had not obtained any authority to recover the debts due to her deceased husband's estate, was not a valid discharge to the debtor, and that the executors of the deceased creditor were fully entitled to ignore such a payment, and to sue for the same.

Mere neglect on the part of the executors to give notice of their claim to the debtor did not debar them from claiming the debt, although it might be a good reason for declining to give interest, damages or even costs as regards such a claim. GOLAK NATH *v.* CRADDOCK 72

RES JUDICATA.

1. Res judicata—*Civil Procedure Code, 1882, Section 13—Matter which might have been a ground of defence in former suit.—A,* in execution of a decree against B (an Arain Zamindar) attached B's share in certain landed property. C, who alleged himself to be a mortgagee objected to the attachment. Subsequently, however, C withdrew the objection based on his mortgage-deed and put forward a deed of sale. The objection founded on the deed of sale was held to be sound, and the property released from attachment. A then brought a suit for a declaration to the effect that the property was liable to attachment, C resisted the claim on the strength of his deed of sale but it was decreed by the Munsiff and confirmed on appeal. A then proceeded in execution of his decree to attach the share of B in the property but the sons of C who had died in the interim again objected to the attachment basing their objection on the mortgage-deed purporting to have been executed in favour of their father by B. The objection being upheld, A instituted the present suit for a similar declaration, the sons of C pleaded the deed of mortgage.

Held, that the sons of C were precluded from pleading the mortgage-deed in bar of the present claim, as it was "a matter which might and ought to have been made a ground of defence" in the former suit, and that it must accordingly be deemed to have been a matter substantially and directly in issue in such suit. BADAR DIN *v.* BURU MAL 4

2. Res judicata—*Omission or addition of parties.*

The plaintiffs obtained a decree against the present defendant in 1897 in the Court of the Divisional Judge to the effect that the defendant be restrained from using a certain door and certain *panals* except for the

The references are to the Nos. given to the cases in the "Record."

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RES JUDICATA—concl'd.

purpose of discharging rain water, with a direction that, if the defendant should thereafter use any of the said *parnalas* for the discharge of water from the privy, the plaintiff might claim to have such *parnala* or *parnalas* closed. In 1901 the plaintiffs again sued the defendant on the allegation that she had been using the door and one of the *parnalas* contrary to the terms of the former decree and asked that they might be closed. The defendant having pleaded that the plaintiffs were not the sole owners of the lane, two other persons were added as defendants. The first Court decreed the plaintiffs' suit in respect to the closing of the *parnala*, but dismissed the claim with respect to the door, holding that the former suit was not a bar to the re-opening of the point or question in dispute, as the parties to the suit were not the same. On appeal the Divisional Judge held that the point or question in dispute was *res judicata*, and decreed the claim in full. On further appeal to the Chief Court the defendant contended (i) that the question in dispute was not *res judicata*, as the parties in the two suits were different, and all the necessary issues in the previous suit were not determined by the first Court; and (ii) that the only remedy of the plaintiffs was by execution of their former decree. Held, (i), that the question in dispute between the parties was *res judicata*, the omission or addition of parties in a former or subsequent action making no difference where the parties to the subsequent action were before the Court in the previous action, and the plea that in the previous suit the Divisional Judge had determined several points which were not decided by the first Court having no force, inasmuch as the decision on those points could be arrived at on the pleadings and the evidence on the record:

(ii) that having regard to the form of the decree in the previous suit, the present claim was not barred by any rule of law. MUSSAMMAT JANNO v. RAFIK KHAN 12

3. Jurisdiction—Res judicata, plea of—Competency of inferior Court to enquire the jurisdiction of superior Court which passed the former decree—Consent to jurisdiction.—Held, that a decree given by a Court not competent to grant it is a mere nullity and cannot be pleaded as a bar to a subsequent suit, the parties being entitled to ignore its existence altogether, and in such a case there is no impropriety in an inferior Court deciding in the subsequent proceeding whether the decree of the superior Court in a former suit (pleaded as a bar) was not void on the ground of defect of jurisdiction. PARWA v. MUSSAMMAT SANGARAN 37

REVERSIONER.

1. Suit by reversioner to enforce his right in respect to land on the ground that the alienation had been made without necessity which alienation had already been challenged by his ancestor on the ground of pre-emption only—Locus standi—Waiver—necessity.

See Custom—Alienation, No. 3 15

2. Alienation by sonless proprietor—Right of reversioner to contest such alienation in presence of wife and daughter-in-law.

See Custom—Alienation, No. 4 29

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REVERSIONER—concl'd.

No.

3. *Suit by a reversioner for possession of immovable property—Descendant in possession under will made by testator without title—Reversioner not barred by reason of his having failed to contest such will within three years.*

See *Custom—Inheritance, No. 3* 19

4. *Suit by reversioner on death of widow—Possession adverse to the female cannot be adverse to the reversioner.*

See *Limitation Act, 1877, Article 141* 41

REVISION.

1. *Revision—Chief Court's powers of—Practice—Punjab Courts Act, 1884, Section 70 (1) (a) as amended.—Respondent became surety under Section 336, Civil Procedure Code, for a judgment-debtor, and undertook to produce him in Court when called upon, and that he should within one month file an application to be declared an insolvent. The judgment-debtor duly applied to be declared an insolvent, but his application was rejected in default of prosecution after one appearance. The decree-holder thereupon applied for the execution of his decree against the surety, which was refused by the District Judge on the ground that the obligation of the surety was discharged. The decree-holder preferred an appeal to the Chief Court, and on the Court's deciding that such an order was not appealable, the decree-holder applied for revision under Section 70 (1) (a) of the Courts Act.*

Held, following Joti Mal v. Coates (15 P. R., 1901), that as the decree-holder had an action against the respondent on the surety bond and the question involved was of considerable importance, the matter was not one for the exercise of the extraordinary powers of revision of the Chief Court under Section 70 (1) (a) of the Courts Act. BRIJ LAL v. HAEJI MAL 8

2. *Revision from a decree in a suit to recover possession under Section 9 of the Specific Relief Act—Chief Court's powers of.—Held, that a decree in a suit for the recovery of possession under Section 9 of the Specific Relief Act in favour of the plaintiff is not open to revision by the Chief Court, on the ground that the Court below has misapprehended and misrepresented the evidence, oral and documentary on the record where, on the allegations contained in the plaint, the plaintiff had a cause of action and the Court had jurisdiction to entertain the suit, and the errors attributed by the petitioner to the Court below were intrinsic to the inquiry and decision.* SAFDAR JANG v. SHANKAR SINGH 13

3. *Chief Court's powers of revision—Practice—Punjab Courts Act, Section 70.—Held, that it is the general policy of the law and the usual practice of the superior Courts that the latter should interfere on the revision side in the interests of justice only in those cases where there is no other remedy or the remedy is cumbrous or expensive and to refer the applicant to it would be tantamount to denying him his relief.* COATES v. KASHI RAM 76

The references are to the Nos. given to the cases in the "Record."

REVISION—*concl'd.*

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| 4. <i>Arbitration—Decree in accordance with an award—Revision—Civil Procedure Code, 1882, Section 622.—Held, that the omission of a Court to remit an award which determines matters not referred to arbitration is not subject to revision, and, although a revision lies against a decree based upon an arbitration award on the ground of material irregularity, yet that material irregularity must have reference to the proceedings of the lower Court and not to those of the arbitrator.</i> SITA RAM V. DHANI RAM | 92 |
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RIGHT TO SUE.

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| 1. <i>Suit by reversioner to enforce his right in respect to land on the ground that the alienation had been made without necessity, which alienation had already been challenged by his ancestor on the ground of pre-emption only—Locus standi.</i> | |
| See Custom—Alienation, No. 3 | 15 |
| 2. <i>Alienation by sonless proprietor—Right of reversioner to contest such alienation in presence of wife and daughter-in-law.</i> | |
| See Custom—Alienation, No. 4 | 29 |
| 3. <i>Sale of immovable property in execution of decree—Title of auction purchaser who has not obtained a certificate—Right of pre-emptor to maintain suit before a certificate has been granted.</i> | |
| See Pre-emption, No. 3 | 9 |

RIWAJ-I-AM.

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| All disputes relating to alluvion and diluvion of land should be decided by giving full effect to the provisions of the <i>Riwaj-i-am</i> of the villages concerned. BANDU KHAN V MUSSAMMAT UMRI | 63 |
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SALE.

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| 1. <i>Certificate of—</i> | |
| See Pre-emption, No. 3 | 9 |
| 2. <i>Suit for a declaration that land belonging to an agriculturist is liable to attachment and sale.</i> | |
| See Punjab Alienation of Land Act, 1900, Section 16 | 4 |
| 3. <i>Assignment of immovable property for money plus favor and past services is a sale and gives rise to the right of pre-emption.</i> KISHAN SINGH V. JAI KISHAN DAS | 2 |

SMALL CAUSE COURT ACT, 1887.

ARTICLE 18.

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| <i>Suit to recover money spent in connection with the guardianship of a minor—Suit relating to a trust.—Held, that a suit by the guardian of a minor to recover money spent by him in connection with the guardianship of the person and property of his ward over and above the amount of the income realized by him is a suit "relating to a trust" within the meaning of Article 18 of the second Schedule to the Provincial Small Cause Court Act, and is therefore not cognizable by the Small Cause Court.</i> JAGAN NATH V. NIRANJAN DAS | 58 |
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The references are to the Nos. given to the cases in the "Record."

	No.
SMALL CAUSE COURT SUIT.	
<i>Munsif trying case withdrawn from Small Cause Court—Finality of order of Munsif.</i>	
See <i>Civil Procedure Code, Section 25</i>	83
SPECIFIC RELIEF ACT, 1877.	
SECTION 9.	
<i>Revision—Chief Court's powers of revision—Revision from a decree in a suit to recover possession under Section 9 of the Specific Relief Act.—Held, that a decree in a suit for the recovery of possession under Section 9 of the Specific Relief Act in favour of the plaintiff is not open to revision by the Chief Court, on the ground that the Court below has misapprehended and misrepresented the evidence, oral and documentary on the record where, on the allegations contained in the plaint, the plaintiff had a cause of action and the Court had jurisdiction to entertain the suit, and the errors attributed by the petitioner to the Court below were intrinsic to the inquiry and decision. SAFDAR JANG v. SHANKAR SINGH</i>	13
SECTION 42.	
<i>Declaratory decree—Marriage—Suit for a declaration that the defendant is not the lawful wife of the plaintiff—Jurisdiction of Civil Court to entertain such a suit when an order for maintenance passed under Section 488 of the Criminal Procedure Code is in force against the plaintiff—Held, that a suit by a person against whom an order for maintenance in favour of defendant has been made by a Criminal Court under Section 488, Criminal Procedure Code, lies in a Civil Court for a declaration that the defendant is not his wife.—MUSSAMMAT BAKHAN v. ALA BAKHSH</i>	26
STAMP ACT, 1899.	
SECTION 2 (5) (b).	
<i>Acknowledgment of a debt—Bond.—Held, that an acknowledgment of a debt signed by the executants and attested by a witness by which the plaintiff was to receive the balance from the executants was a bond within the meaning of Section 2 (5) (b) of the Indian Stamp Act, 1899, as the executants had obliged themselves thereby to pay the money. DAULA v. GONDA</i>	35
	F. B.
"SUIT," MEANING OF.	
<i>Held that the word "suit" includes all proceedings in a suit including the proceedings in execution. PRICE v. GOLAK NATH</i>	39
SUIT—VALUE OF.	
<i>Partition—Suit to enforce a right to share in joint family property—Valuation for purposes of jurisdiction and Court-fee—Court Fees Act, 1870, Section 7 (iv) (b)—Suits Valuation Act, 1870, Section 8.</i>	
See <i>Partition</i>	28

The references are to the Nos. given to the cases in the "Record."

	No.
SUITS VALUATION ACT, 1887.	
SECTION 4.	
See <i>Appeal</i> , No. 4	24
SECTION 8.	
<i>Suit to enforce a right to share in joint family property—Valuation for purposes of jurisdiction and Court-fee—</i>	
See <i>Partition</i>	28
T.	
TANK—CHIEF OF.	
<i>Chief of Tank—Succession—Inheritance—Family Custom—Primogeniture—Right of junior member of the family.</i>	
See <i>Custom—Inheritance</i> , No. 7	67
TRANSFER OF CASE.	
1. <i>Small Cause Court suit—Munsif trying case withdrawn from Small Cause Court—Finality of order of Munsif.</i>	
See <i>Civil Procedure Code</i> , 1882, Section 25	83
2. <i>Transfer of suit—Disqualification of presiding Judge—Reasonable apprehension of bias—In dealing with applications for transfer of case under Section 25 of the Civil Procedure Code in which there is no question of personal interest, the superior Court should require the applicant to show that the apprehension is reasonable, i.e., such as a man of a sound sense would regard as legitimately raising the inference of bias, but where the acts of presiding Judge complained of were colourless and innocent and raised no presumption one way or the other in respect of his mental attitude about the case, the apprehension must be held unreasonable. SHER SINGH v. THAKAR DAS</i>	88
TRANSFER OF PROPERTY ACT, 1882.	
SECTION 54.	
<i>Alienation of property pending suit relating thereto.</i>	
See <i>Lis pendens</i>	80
TRUST.	F. B.
<i>Suit to recover money spent in connection with the guardianship of a minor—Suit relating to a trust—Jurisdiction of Small Cause Court.</i>	
See <i>Small Cause Court Act</i> , Article 18	58
TRUST ACT, 1882.	
SECTION 5.	
<i>Charitable trust—Oral gift of immovable property creating charitable trust—Trust of immovable property—Indian Trust Act, 1882, Section 5.—Locus standi of third parties to contest gift.—Held, that a gift of immovable property creating a public charitable trust does not fall within the purview of Trust Act, 1882, and that therefore it is not essential that it should be in writing signed by the author of the trust or the trustee and registered.</i>	

The references are to the Nos. given to the cases in the "Record."

	No.
TRUST ACT, 1882— <i>concl'd.</i>	
The invalidity of a trust is a matter which concerns the creator of the trust and his heirs, creditors, trustees and beneficiaries, and not those who are mere debtors of the donor; the latter can only contest the donees' title, but as soon as that is established their defence as to the <i>locus standi</i> fails.	
<i>Held, also</i> , that where a gift does not require a writing for its validity, and is upheld by the donor in Court, third parties cannot contest the donee's title. SANATAN DHARM SABHA, HOSHIARPUR, v. MUSSAMMAT SOBHI	75
U.	
UNDUE INFLUENCE.	
See <i>Contract Act</i> , 1872, Section 16	77
V.	
VALUATION OF SUIT.	
See <i>Appeal</i> , No. 4	24
VILLAGE COMMUNITY.	
See <i>Pre-emption</i> , No. 15	66
W.	
WAIVER.	
1. <i>Jurisdiction—Suit against ruling Chief—Institution of suit without obtaining the consent of Governor-General in Council—Waiver by defendant of objection to consent—Effect of such waiver.</i>	
See <i>Civil Procedure Code</i> , 1882, Section 433... ..	40
2. <i>Heirs bound by the waiver on the part of their ancestors.</i>	
See <i>Custom—Alienation</i> , No. 3	15
WAJIB-UL-ARZ.	
1. <i>Construction of—</i>	
See <i>Pre-emption</i> , No. 2	3
2. <i>Custom—Pre-emption—Right of, on mortgages—Wajib-ul-arz.</i>	
See <i>Pre-emption</i> , No. 10	46
3. An entry in a <i>Wajib-ul arz</i> should not be considered as sufficient to establish a custom, especially when it is proved that it has never been acted upon or the right exercised in accordance therewith. RAM SARAN DAS v. MULA SINGH	64
4. Burden of proof that any existing custom has been incorrectly stated in a record of rights rests on the person making such assertion. MAHA RAM v. RAM MOHAR	65
AHMAD SHAH v. KHUDA BAKHSH	33

The references are to the Nos. given to the cases in the "Record."

	No.
WIDOW.	
<i>Marriage of a minor Hindu widow by chadar andazi—Consent of lawful guardian to such marriage necessary—Presumption of legality of marriage—Khatris of Lahore.</i>	
See <i>Hindu Law—Marriage</i> ,	49
WILLS.	
See <i>Custom—Alienation</i> , Nos. 6, 11	48, 86
<i>Inheritance</i> , No. 3.	
<i>Distinction between gifts inter vivos and wills among Punjab agriculturists.</i>	
See <i>Custom—Alienation</i> , No. 6	48
	F. B.

Chief Court of the Punjab.

CIVIL JUDGMENTS.

Full Bench.

No. 1,

*Before Mr. Justice Anderson, Mr. Justice Johnstone, and
Mr. Justice Rattigan.*

MAHA RAM AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Ver: sus

RAM MAHAR,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE

Civil Appeal No. 269 of 1902.

Civil Procedure Code, 1882, Sections 562, 588 (28)—Appeal from order of remand in an unclassified suit under Rupees 200 in value—Power of Chief Court to go into the merits on appeal from a remand order.

Held by the Full Bench, that in hearing an appeal under Section 588 (28), Civil Procedure Code, the Chief Court is not confined to the mere question of procedure: it can and should go into the merits of that preliminary point upon which the lower Appellate Court has remanded the case under Section 562; and where in the preliminary point questions of law or custom are involved it can and should discuss those questions.

Bhai Wazira v. Chuhan Mal ⁽¹⁾, *Khalas v. Kalyan Singh* ⁽²⁾, *Bidam v. Imrat* ⁽³⁾, *Mussammat Makhan Devi v. Asa Singh* ⁽⁴⁾, *Loki Mahto v. Aghoree Ajail Lal* ⁽⁵⁾, *Abraham Khan v. Faizunnessa* ⁽⁶⁾, *Bhanbala v. Bipaji Bapuji* ⁽⁷⁾, and *Gauri Shanker v. Karima Bibi* ⁽⁸⁾, referred to.

Further appeal from the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 8th April 1902.

Shadi Lall, for appellant.

Lakshmi Narain, for respondent.

The judgment of the learned Judges, who constituted the Full Bench, was delivered by

JOHNSTONE, J.—(ANDERSON and RATTIGAN, JJ., concurring)— 28th July 1902.

The question referred for decision to this Full Bench is—whether this Court should, on appeal under Section 588 (28), Civil

⁽¹⁾ 85 F. R., 1895, F. B.

⁽²⁾ I. L. R., V Cal., 144.

⁽³⁾ 109 P. R., 1887.

⁽⁴⁾ I. L. R., XVII Cal., 168.

⁽⁵⁾ I. L. R., 3 All., 675, F. B.

⁽⁶⁾ I. L. R., XIV Bom., 14.

⁽⁷⁾ 6 P. R., 1892.

⁽⁸⁾ I. L. R., XV All., 413.

Procedure Code, discuss questions of law and custom, the value of the suit (unclassified) being under Rs. 200.

The learned pleader for the appellants-defendants explained that his clients have appealed to this Court in an unclassified suit, value under Rs. 200, against an order of the Divisional Judge, Delhi, remanding the case for re-trial to the first Court under Section 562, Civil Procedure Code. The suit was one for pre-emption, and the first Court had dismissed it on the ground that no custom of pre-emption was proved to prevail in the area concerned. The learned Divisional Judge held that the custom did prevail and that by it the first right to pre-empt vests in relatives, and he remanded the case, as already stated, under section 562, Civil Procedure Code. The first point insisted upon before us by the appellant's pleader is that an appeal lies under section 588 (28), even where a final decree in the case would, as here, not have been appealable to this Court. We do not understand the appellants' counsel to deny this, and the point seems to us clear. It is therefore hardly necessary for us to discuss it at length. Had the Legislature intended the contrary, it would have been easy to let this appear in the wording of Section 588.

The next point is—what are the powers of this Court in dealing with an appeal like the present? Is the Court confined to the mere question of procedure, or can it go into the merits of the decision of the lower Appellate Court on the "preliminary point" and decide that point on the merits? In *Bhūi Wazira v. Chuhar Mal* ⁽¹⁾ a Full Bench of this Court took the latter view in a case in which the suit was a Small Cause Court suit under Rs. 500 in value, and so not appealable to this Court. This ruling appears to us absolutely in point; and there are many others substantially on the same side, see *Khalas v. Kalyan Singh* ⁽²⁾, *Badam v. Imrat* ⁽³⁾, *Mussammat Makhan Deri v. Asa Singh* ⁽⁴⁾, *Loki Mahto v. Aghoree Ajail Lall* ⁽⁵⁾, *Abraham Khan v. Faizunnessa* ⁽⁶⁾, and *Bhanbula v. Bapaji Bapuji* ⁽⁷⁾.

In *Gauri Shanker v. Karima Bibi* ⁽⁸⁾, remarked upon by the learned Chief Judge in his order of reference, it was suggested that in an appeal under Section 588 (28), Civil Procedure Code, the High Court could go into questions of law but not of fact. We say "suggested" because it appears to us that the matter did not call for decision in that case; and on the whole we prefer

⁽¹⁾ 85 P. R., 1895, F. B.

⁽²⁾ 109 P. R., 1887.

⁽³⁾ I. L. R., III All., 675, F. B.

⁽⁴⁾ 6 P. R., 1892.

⁽⁵⁾ I. L. R., V Calc., 144.

⁽⁶⁾ I. L. R., XVII Calc., 163.

⁽⁷⁾ I. L. R., XIV Bom., 14.

⁽⁸⁾ I. L. R., XV All., 413.

to follow the numerous authorities referred to above, and therefore not to restrict the powers and duties of this Court in the manner indicated. The counsel for the respondent has been unable to quote any authority except the above Allahabad case, and he has contended himself with discussing and attempting to distinguish *Bhai Wazira v. Chuhan Mal* ⁽¹⁾ and *Khilas v. Kulayin Singh* ⁽²⁾. His arguments, where we have been able to follow them, seem to us hardly to require serious refutation.

We would then answer the question referred to us by laying it down that, in hearing an appeal under Section 588 (28), Civil Procedure Code, assuming that the remand was on a "preliminary point," this Court can and should go into the merits of that preliminary point upon which the lower Appellate Court has remanded under Section 562, and that it is not confined to the mere question of procedure; and, therefore, if there are involved in the preliminary point questions of law or custom, this Court can and should discuss those questions. The reference having been answered in this way, the case should now go back to a single Judge for disposal.

No. 2.

Before Mr. Justice Chatterji and Mr. Justice Harris.

KISHEN SINGH,—(PLAINTIFF),—APPELLANT,

Versus

JAI KISHEN DAS,—(DEFENDANT),—RESPONDENT.

APPELLATE SIDE.

Civil Appeal No. 1622 of 1898.

Custom—Pre-emption—Sale of property not used as residential house—Sale in lieu of money plus favor and past services—Guardian of minor—Lease of a portion of the property by guardian—Inability of minor to claim pre-emption—Estoppel—Panjab Lanes Act, 1872, Sections 9, 11.

Plaintiff sued for pre-emption in respect of the sale of a large property known as Pari Mahal in the city of Lahore, consisting at the time of sale of an enclosure with shops outside and of a number of small huts inside, which were generally occupied by blacksmiths, carpenters and cow and goat herdsmen with their cattle. The claim was based on the ownership by plaintiff of a portion of the property adjoining. Amongst other defences the defendant pleaded:

- (1) that the plaintiff having through his guardian taken a portion of the property in suit on lease was estopped from making the claim

(1) 85 P. R., 1895, F. B. (2) 109 P. R., 1887.

- (ii) that part of the consideration for the transfer consisted of a favor and past services and that consequently the transfer did not amount to a sale;
- (iii) that the property was an enclosure consisting of shops, etc., and being of the nature of a *katra* or *serai* the custom of pre-emption did not extend thereto;

Held,

- (i) that the mere fact that the guardian of the minor plaintiff temporarily leased a small portion of the property in suit at a date between the transfer and institution of the suit did not amount to an estoppel;
- (ii) that an assignment, of immovable property for money plus favor and past services was a sale within the meaning of Section 9, Punjab Laws Act, and that a plaintiff in such a suit would have to pay the market value of the property;
- (iii) that the plaintiff's claim must be dismissed on the ground that he had failed to prove that by local custom a right of pre-emption on sale of property which had not been used as residential premises for several centuries and which was of the nature of a *serai* or *katra* existed.

Haji Muhammad v. Mussammot Bakhlo ⁽¹⁾, *Gul Muhammad Khan v. Khan Ahmad Shah* ⁽²⁾, *Fida Ali v. Muzaḡfar Ali* ⁽³⁾, *The Queen-Empress v. Appavu* ⁽⁴⁾, *Mussammot Nur Jehan v. Aziz-ud-din and others* ⁽⁵⁾, referred to.

First Appeal from the decree of Lala Gopal Das, District Judge, Lahore, dated 5th September 1898.

Muhammad Shafi, for appellant.

Parker and Ganpat Rai, for respondent.

The judgment of the Court was delivered by—

24th Nov. 1902.

HARRIS, J.—This is an appeal from the order of the District Judge, Lahore, dismissing the plaintiff's claim to pre-empt part of a property in Lahore City known as *Pari Mahal*.

The plaintiff, then a minor, sued as adopted son of Gurdit Singh, deceased, through his natural father, Hardit Singh, as next friend. Plaintiff alleged in his plaint that by deed of the 27th June 1895 the property in suit was sold by the *Maharaja* of Kashmir to the defendant, Lala Jai Kishen Das, Motamid of the

⁽¹⁾ 54 P. R., 1889.

⁽²⁾ 29 P. R., 1893.

⁽³⁾ I. L. R., V All., 65.

⁽⁴⁾ I. L. R., IX Mad., 141.

⁽⁵⁾ 108 P. R., 1895.

Kashmir State, for Rs. 27,000, and based his claim on the fact that his house is part of the Pari Mahal, and adjoins the property in suit.

The defendant's pleas which are material to the appeal were (1) that the market value of the property was about Rs. 1,00,000 and should be ascertained; (2) that according to the deed the property was transferred in lieu of Rs. 27,000 in recognition of defendants' good services; (3) that the claim had not been brought in good faith; (4) that plaintiff had not been adopted by, and was not the heir of Gurdit Singh, the owner of the property, which formed the basis of claim; (5) that no custom of pre-emption prevailed in the sub-division of the city known as Pari Mahal; (6) that Pari Mahal was an enclosure consisting of shops, etc., and being of the nature of a *katra* or *serai*, the custom of pre-emption did not extend thereto; (7) that plaintiff, having through Hardit Singh on the 26th October 1895 (*i.e.*, prior to suit) taken a portion of the property in suit on lease, was estopped from claiming.

In replication the plaintiff traversed the pleas, and stated the sub-division of the city for purposes of pre-emption as Shahalmi Gate and Pari Mahal to be a house, and not of the nature of a *katra* or *serai*. Defendant rejoined that Pari Mahal was the sub-division in which the property in suit was situated.

The following issues were fixed:—

- (1) Whether plaintiff is the adopted son and heir of Gurdit Singh and entitled to sue?
- (2) Whether plaintiff is barred from suing by reason of his having waived or abandoned his claim, or the suit not being *bona fide* in his interest?
- (3) Whether Pari Mahal is a sub-division of Lahore or a part of Shahalmi Gate Sub-division?
- (4) Whether there is a custom of pre-emption in the sub-division in which the property may be found to be situated under which this property can be claimed?
- (5) Whether the property is like a *serai* or *katra*, and no right of pre-emption attaches to it?
- (6) Whether plaintiff has executed a lease in favour of defendant, and is thereby estopped from claiming pre-emption?

(7) Was part of the consideration of the sale favour and past services; and, if so, is defendant entitled to claim market value?

(8) What is the market value?

The District Judge (1) found the adoption established; (2) that there was no waiver or estoppel, but that the suit was not a *bonâ fide* one in the interest of the minor; (3) that Pari Mahal is only part of the Shahalmi Gate Sub-division; (4) that the "weight of evidence furnished by the records of decided cases" of pre-emption was in favour of plaintiff, but that "local custom" does not attach to rights of pre-emption in cases of sales of "*katras*," and that as the property in suit was "like a *serai* or "*katra*," no custom had been proved by which a right of pre-emption attached to the property; (5) that part of the consideration for the transfer consisted of favour and past services, and that consequently the transfer did not amount to a sale; (6) that if a sale the plaintiff should pay the market value, which was found to be Rs. 61,000.

The suit was dismissed with costs on the decision arrived at on the fourth issue and Hardit Singh was made liable for the costs.

This appeal was preferred by Hardit Singh on behalf of the minor plaintiff, but on a subsequent application made on the ground that the plaintiff had attained majority, we ordered Hardit Singh to be discharged as next friend, though necessarily remaining, with reference to the first Court's order as to costs and to any order as to costs by this Court, on the record.

The grounds of appeal relate (1) to the market value; (2) to the *bonâ fides* of the claim; (3) to the nature of the property and custom applicable; (4) to the nature of the transfer. It is also urged that no proper opportunity was given for argument on the point of custom. As regards the last point we merely have to remark that the whole case has been argued at length before us, and that it appears that a pleader did argue the question of custom before the District Judge. To clear the ground we may at once say that as the plaintiff himself has prosecuted the appeal the question of *bonâ fides* of the claim is not pressed for respondent, though his counsel to support the first Court's order as to costs contends the claim was of a speculative nature. The finding, too, of the District Judge on that point cannot, we think, be supported on the conjectures expressed in his judgment.

For the respondent it is contended that the finding on the questions of adoption and estoppel are wrong. But in our opinion these two questions were rightly decided. As regards adoption there is conclusively respectable evidence that Gurdit Singh stated plaintiff to be, and treated him as, his adopted son. That evidence is not rebutted in any manner whatever. There is nothing on the record to show that the widows of Gurdit Singh are in possession, or lay claim to the property by reason of which plaintiff asserts his pre-emptive right. The second marriage of Gurdit Singh is fairly explained. We consider there is no force in the contention that there should be ample proof of a ceremony of adoption. Gurdit Singh was a *tarkhan*, and the customary appointment of his nephew, the plaintiff, as his heir was natural, and has been sufficiently evidenced.

Nor do we think that the lease of October 1895 can be successfully pleaded in bar. We do not propose to discuss this point at length, as we think the appeal should fail on other grounds. But it seems to us that the mere fact that Hardit Singh as plaintiff's guardian temporarily leased a small portion of the property of suit at a date between the transfer and the institution of the suit does not amount to estoppel. Defendant was then proprietor of the property, and had to be described as such. There was no relinquishment of any pre-emptive right, and the incidents of estoppel are absent.

On the other hand, we cannot agree with the District Judge that the transfer to the defendant should not be regarded as a sale giving rise to a right of pre-emption. The view adopted by the District Judge was that, as part of the consideration consisted of favour and past services incapable of money valuation, there was no sale. It is contended for plaintiff-appellant that the deed shows Rs. 27,000 to be the price, and that either the mention of past services was mere surplusage or customary compliment, or that, in consideration of such services, defendant obtained the property at a low price to the benefit of which the pre-emptor is entitled. For respondent it is urged that the transaction was a grant such as the potentate of a Native State often makes in favour of a valued servant, and that the Rs. 27,000 are to be regarded as *nazrana*, but that if the deed of transfer is to be construed as one of sale the consideration consisted of Rs. 27,000 plus past services, which services are quite capable of being estimated at a money value from a consideration of the market value. On this point we have perused the deed and

consulted the various authorities *Haji Muhammad v. Mussammât Bakhto* ⁽¹⁾, *Gul Muhammad Khan v. Khan Ahmad Shah* ⁽²⁾, *Fida Ali v. Muzaffar Ali* ⁽³⁾, *The Queen-Empress v. Apparū* ⁽⁴⁾, *Benjamin on Sales*, pp. 1, 3, and p. 82) cited. On our construction of the deed the mention of past services was not mere surplusage, but should be taken as part of the consideration, and further that an enquiry into market value rendered those services capable of being estimated in money. We agree with the decision in *Gul Muhammad Khan v. Khan Ahmad Shah* ⁽²⁾, and disagree with the argument that the price must, in order to give rise to a right of pre-emption under the Punjab Laws Act, only be money. It is clear that such an easy method of defeating pre-emption was never contemplated by the legislature.

But we consider that the appeal should fail on the ground that plaintiff has not established a custom whereunder he may pre-empt the property in suit. This part of the case was covered by issues 3 to 5 of the first Court, which have been set out above. No objection has been taken to the frame of those issues, and we cannot, after referring to the pleadings, accept the contention of appellant's counsel, that the existence of the custom of pre-emption in the (so-called) sub-division of Shahalmi Gate was not denied by defendant. On issue 3 we are clear that Pari Mahal is not to be regarded as a sub-division for the purpose of pre-emption. Pari Mahal is not proved by any evidence on the record to be other than the property described at page 231 of Muhammad Latif's History of Lahore: it is a distinct property, which, so far as we can judge from the maps put before us, has not given a name to any surrounding streets, bazars or lanes, and is not a sub-division in itself of Lahore City. As to what is the sub-division to be considered in this case is a matter of much more difficulty. In the first place there has been some discussion as to the correctness of the plan printed in the supplementary paper book. But with the exception that that plan would make the Shahalmi Bazar synonymous with the Machi Hatta Bazar, that a portion of the pink area is alleged by defendant not to have belonged to Gurdit Singh, and that the location of some of the alleged pre-empted properties are therein wrongly shown, that plan fairly represents the property in suit and its neighbourhood. Counsel for appellant would have no regard the whole of the area in the

⁽¹⁾ 54 P. R., 1889.

⁽²⁾ 29 P. R., 1893.

⁽³⁾ I. L. R., V All., 65.

⁽⁴⁾ I. L. R., IX Mad., 141.

plan excepting the Machi Bazar as the sub-division, while respondent's counsel points to the portion of the Shahalmi Bazar towards the Shahalmi Gate. We have been taken by counsel on either side at great length through the indefinite and conflicting statements of witnesses on both sides as to what Shahalmi Guzar may be considered to include, and we do not think it matter for wonderment that the District Judge did not discuss that particular question under issue 4 as framed. It is not, however, for the Court to invent a sub-division, and if the matter is eventually left indefinite, it is not the vendee who thereby has to suffer, but rather the pre-emptor who has to prove all the incidents of the custom. We are certainly not prepared to find either that Machi Hatta and Shahalmi Bazar are synonymous or that the sub-division for pre-emption extends from Rang Mahal to the Shahalmi Gate. We think there is far more reason in the contention of defendant's Counsel that Pari Mahal forms part of the business quarter more immediately adjoining the Shahalmi Gate, a quarter more or less distinct in its nature from the more residential areas surrounding it. It may, however, be fairly urged that the distinction is of an arbitrary nature. But assuming that the sub-division is that contended for by counsel for appellant, we are unable to find that a custom extending the right of pre-emption to property of the nature of that in suit has been established even if the instances cited may be held to have proved a custom of pre-emption with regard to residential houses in residential quarters within that area. In the first place we are clearly of opinion that the two alleged instances (of Soheli Singh and of Mokanda Mal at page 23 of the printed record) of pre-emption with regard to shops do not establish a custom of pre-emption on sale of shop property. It is extremely doubtful or at least has not been ascertained whether any part of the property in suit in Soheli Singh's case was shop property. The copy on the record describes the property as two-thirds of a house, and it almost clearly appears that plaintiff succeeded on the ground that he was joint owner of the remaining one-third. It is probable that there was a shop below facing the Shahalmi Bazar, but whether the shop formed part of the claim is not certain (see evidence of Mokanda on the point). It appears the house did not face the Bazar but opened on to Kucha Dogran which seems to be a residential quarter. The right of the joint owner was not disputed, and the case was compromised. In Mokanda Mal's case again the property is mentioned in the order as a house though Mokanda Mal stated it was a shop, and in that case, too, there was no contest on the question of right, but

the price alone formed the subject of an award. It is an argument though not of much force that at the time (1881 and 1883) the above cases were decided, the distinction between residential and shop property had not been emphasized by the Courts. Against the existence of a custom in the case of shops there is the contested case of *Daim v. Ramditta and others*, the shop in which case must from its proximity and position be deemed to be within the same pre-emption area as the property (if shop property) in the cases of *Sohel Singh* and *Mokanda Mal*. It must also be borne in mind that although instances in which the right is not contested are relevant, they are not of the same weight as those in which the right has been found, after contest, to exist or not exist.

Further we do not find the property in suit to be of a residential character. We may presume from the account given in Sayad Muhammad Latif's standard work on Lahore city at page 231 that the Pari Mahal was in the time of Shahjahan, the private residence of a nobleman. But in the time of the Sikhs the property changed in character. The building became the property of the Sikh Government, and seems to have been turned into a stable, *i. e.*, presumably the interior, for the exterior on two sides appears to have been always formed by a row of shops. Under the British Government it was *nazul* property, and the certificate of sale to Muhammad Sultan in 1859 shows that part of the building which is made the basis of the right had been used as a police station, which part was sold subsequently to one Ram Jas, and by him to Gurdit Singh. It has not, in our opinion, been even established by the record that the portion purchased by Gurdit Singh was ever used by him as a private residence, and looking at the surroundings it is *prima facie* improbable that it was more than a *mardana baithak*, and the evidence of the place of plaintiff's betrothal by Gurdit Singh points in the same direction. So far as regards the property in suit, whatever the character of Gurdit Singh's portion of the original Pari Mahal, it is shown by the evidence to have consisted at the time of sale and suit of shops outside and a number of small huts inside the enclosure, occupied by blacksmiths, carpenters and cow and goat-herds who ostensibly carried on their occupations there. There appears to be a public gateway into the enclosure from the *bazar* flanked by a meat shop and a wine shop.

Under these circumstances we cannot find the property to be of that residential nature insisted on by plaintiff. The authority of *Mussammatt Nur Jehan v. Azizuddin and others* (1) is pressed

(1) 108 P. R., 1895.

upon us in support of the contention that if the property was once residential it does not lose its character by being leased in portions to various tenants, and that the large extent of the premises does not militate against the exercise of the right of pre-emption. But we consider the ruling clearly distinguishable. In that case the property was part of a residential house standing in a residential quarter. In the present case there is nothing to show the premises to have been used as residential for several centuries, for the old buildings no longer exist, and it cannot be said that the housing of blacksmiths, carpenters and cow and goat-herds in sheds and small huts, mostly new, in a square opening upon a *bazar* constitutes the property, the frontage of which on two sides consists of a row of shops, a house, the privacy of which is in danger. Even the evidence of plaintiff's witnesses in their description of the property justifies the conclusion arrived at by the District Judge that *Pari Mahal* is like a *kutra* or *serai* and no instances of pre-emption of such a property seem to be known in Lahore. For the above reasons we consider the claim was rightly dismissed, and it thus becomes unnecessary for us to discuss the question of market value. We dismiss the appeal. As we have found no reason for thinking the claim by Hardit Singh as next friend not *bona fide*, and as the plaintiff on attaining majority has ratified Hardit Singh's acts in instituting suit and appeal, we consider the order as to costs throughout should be against the plaintiff alone, and we order accordingly.

Appeal dismissed.

No. 3.

Before Mr. Justice Reid and Mr. Justice Robertson.

HARNAM AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

MUHAMMAD AMAN ALI AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE

Civil Appeal No. 371 of 1899.

Pre-emption—Village divided into panas and thullas—Punjab Laws Act, 1872, Section 12 (c)—Construction of Wajib-ul-arz—

In the village of Kharkhoda, in the Sampla Tahsil of the Rohtak District, which was divided into two *panas* and each *pana* into two *thullas*, the plaintiffs claimed pre-emption on the ground that their land and the land in dispute although in different *thullas* was in the same *pana*, whereas the vendees owned land in the other *pana* only. The vendees resisted the claim on the ground of a special custom contained in the *Wajib-ul-arz* of the village made in 1858 which was to the effect

"that the alienor will alienate first to his brothers and near relations,
 "and in case of their declining to the proprietors of the same *thulla* and
 "in case the aforesaid persons decline the alienor is at liberty to alienate
 "to any one he pleases."

Held, that the provisions of Section 12 (c) of the Punjab Laws Act applied, that the *panas* were sub-divisions, within the meaning of that section, and that the pre-emptive right of the plaintiffs were superior to that of the vendees.

Muhammad Bakhsh v. Sardar Rajindar Singh ⁽¹⁾, *Goomanee v. Raheem-din* ⁽²⁾, and *Uttam v. Buta* ⁽³⁾, cited.

Further appeal from the decree of H. Maud, Esquire, Divisional Judge, Delhi Division, dated 22nd February 1899.

Lal Chand, for respondents.

The judgment of the Court was delivered by—

6th Nov. 1902.

REID, J.—This is a pre-emption suit. The village Khar-khoda, in the Sampla Tahsil of the Rohtak District, is divided into 2 *panas*, Musalmanan and Hinduan, and each *pana* is divided into 2 *thullas*. The vendee appellants, at the date of the sale in suit, owned land in *pana* Hinduan only, while the land in suit is in one *thulla* of *pana* Musalmanan, and the plaintiff owned land in the other *thulla* of that *pana*.

The record of rights of 1858, which has not been shown to have been modified by any subsequent record of rights in respect of pre-emption, runs as follows:—"Every proprietor in our village has power to sell, mortgage, and give away his property on account of personal necessity or the payment of Government revenue; but the custom is that the alienor will alienate first to his brothers and near relatives, and, in case of their declining, to the proprietors of the same *thulla*. In case the aforesaid persons decline, the alienor is at liberty to alienate to any one he pleases." This record of rights is very similar to that in *Muhammad Bakhsh v. Sardar Rajindar Singh* ⁽¹⁾ which provided that alienation should be first to co-sharers who are partners in the same holding or descended from a common ancestors, and that on their refusal alienation might be to *ghair admi*. It was held that, whilst the ordinary provisions of the law of pre-emption were in full force, the special provisions in the village Gohan, in the Hoshiarpur District, gave a preference to two groups of pre-emptors, and that, failing these, an offer might be made under the ordinary law to any one

⁽¹⁾ 121 P. R., 1888. ⁽²⁾ 35 P. R., 1870.
⁽³⁾ 69 P. R., 1893.

outside those two classes. The distinctions between that case and the present case are that the one village is situate in Hoshiarpur and the other in Delhi, that the record of rights of the Hoshiarpur case was of 1884, after the Punjab Laws Act came into force, and that of the present case was of 1858, that in the one case "*ghair admi*" and in the other any one the pre-emptor selected could be offered the property.

In *Gomanee v. Raheem-ud-din* ⁽¹⁾, dealing with a record rights of 1859 of *kasba* Rohtak, it was held that, where the record of rights dealt only with the right of relations, and there was no proof of special custom, it was not to be implied that no other pre-emptive rights existed in the particular community, but that the general rights given by section 13, paragraph 11, of the Punjab Civil Code, should be recognised. No special custom, except that contained in the record of rights, has been established.

On the record of rights and on the authorities cited above we hold that Section 12 (c) of the Punjab Laws Act applies.

In *Uttam v. Buta* ⁽²⁾, dealing with the village Badowal, in the Ludhiana District, divided into 2 *pattis*, each of which was divided into *thullas*, it was held that the *thullas* were sub-divisions within the meaning of Section 12, clauses (c) and (d) of the Punjab Laws Act.

A fortiori a *pana* is a sub-division within the meaning of clause (c) and the pre-emptive right of the plaintiff is superior to that of the appellants.

We see no reason to differ from the concurrent finding of the Courts below as to the amount which actually passed from the vendees to the vendors and as to the market value of the land in suit. The argument at line 37, page 6 of the paper book is sound. The appeal fails and is dismissed with costs.

Appeal dismissed.

(¹) 35 P. R., 1870. (²) 69 P. R., 1893.

No. 4.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

APPELLATE SIDE. {

BADAR DIN AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

BURA MAL AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 897 of 1899.

Res Judicata—Civil Procedure Code, 1882, Section 13—Matter which might have been a ground of defence in former suit—Suit for a declaration that land belonging to an agriculturist is liable to attachment and sale—Punjab Alienation of Land Act, 1900, Section 16 (1).

A in execution of a decree against B (an Arain Zemindar) attached B's share in certain landed property. C, who alleged himself to be a mortgagee, objected to the attachment. Subsequently, however, C withdrew the objection based on his mortgage-deed and put forward a deed-of-sale. The objection founded on the deed-of-sale was held to be sound, and the property released from attachment. A then brought a suit for a declaration to the effect that the property was liable to attachment, C resisted the claim on the strength of his deed-of-sale, but it was decreed by the Munsif and confirmed on appeal. A then proceeded in execution of his decree to attach the share of B in the property, but the sons of C, who had died in the interim, again objected to the attachment, basing their objection on the mortgage-deed purporting to have been executed in favor of their father by B. The objection being upheld, A instituted the present suit for a similar declaration, the sons of C pleaded the deed-of-mortgage.

Held, that the sons of C were precluded from pleading the mortgage-deed in bar of the present claim, as it was a "a matter which might and "ought to have been made a ground of defence" in the former suit, and that it must accordingly be deemed to have been a matter substantially and directly in issue in such suit."

Held, also, that Section 16 of the Punjab Alienation of Land Act does not prohibit the attachment in execution of a decree of the land belonging to an agriculturist, and that a decree-holder is entitled to claim a declaration that certain land is liable to attachment and to be thereafter dealt with as provided in Section 326, Civil Procedure Code.

Further appeal from the decree of Captain G. C. Beadon, Divisional Judge, Amritsar Division, dated 13th April 1899.

Vishnu Singh and Rup Lal, for appellants.

Sadi Lal, for respondents.

The facts of the case are fully stated in the judgment of the Court delivered by :

RATTIGAN, J.—The admitted facts of the case, so far as they are material for the purposes of this appeal, are given in the judgment of the lower Courts, and are as follows:—

28th Oct. 1902.

On the 1st March 1879 one Sarfaraz sold his proprietary rights in certain land to three brothers, Muhammad Bakhsh, Karm Din and Imam Din. On the 31st December 1888 Muhammad Bakhsh executed an unregistered deed-of-sale whereby he purported to sell his $\frac{1}{3}$ rd share in the said land to Karm Din for an alleged consideration of Rs. 92. Three days later, that is to say, on the 3rd January 1889, the said Muhammad Bakhsh executed a registered deed-of-mortgage whereby he purported to mortgage in favour of the same Karm Din, *inter alia*, the said $\frac{1}{3}$ rd share for an alleged consideration of Rs. 1,000 in all.

On the 30th January 1895 plaintiff, in execution of a decree which he held against Muhammad Bakhsh, attached the latter's $\frac{1}{3}$ rd share in the proprietary rights purchased from Sarfaraz, whereupon Karm Din objected to the attachment on the ground that he was the mortgagee thereof under the deed of the 3rd January 1889. Subsequently, however, he withdrew the objection based on the mortgage-deed and put forward the deed-of-sale of the 31st December 1888. The objection founded on the latter deed prevailed, and the property was released from attachment.

Thereupon plaintiff brought a suit (valued for the purposes of jurisdiction at Rs. 92) in the Court of Lala Wazir Chand, Munsif of the 3rd class, and prayed for a declaration, to the effect that the property in question was liable to attachment, *non-obstante* the alleged deed-of-sale which was characterised as a fictitious instrument. In this suit Karm Din relied solely on the deed-of-sale and did not plead the mortgage of the 3rd January 1889 as an alternative ground of defence. Plaintiffs' claim was decreed by the Munsif and the decree was confirmed on appeal by the Additional Divisional Judge, both Courts concurrently finding that the deed-of-sale was fictitious.

Plaintiff thereupon once more proceeded, in execution of his decree, to attach the said $\frac{1}{3}$ rd share of Muhammad Bakhsh in the property, but the sons of Karm Din, the latter having died in the interim, again objected to the attachment, their objection being now based on the mortgage-deed of the 3rd January 1889. The objection being upheld, plaintiff has been obliged to institute a second suit (also value in the plaint for purposes of jurisdiction

at Rs. 92) in which he asks for a declaration that the property is liable attachment and sale, *non-obstante* the said mortgage-deed which he alleges to be fictitious. Defendants, of course, plead the deed in question in bar.

The first Court held that the mortgage to defendant's father, Karm Din, was for good consideration and not fictitious, but decreed plaintiff's claim on the ground that it was the duty of the defendants to have pleaded the said mortgage, in addition to the deed-of-sale, as an alternative bar to plaintiff's former suit, and that as they had omitted to do so, they could not be permitted to urge it now. Defendants appealed to the Divisional Judge who dismissed the appeal, the learned Judge concurring with the first Court in holding that explanation II of Section 13, Civil Procedure Code, debarred defendants from pleading in the present suit the mortgage which they had refrained from pleading in the former suit.

Defendants have preferred a further appeal to this Court, and the points which we have to decide are (1) whether the lower Courts are correct in deciding that explanation II of Section 13, Civil Procedure Code, is applicable to the case, and that consequently the question as to whether the mortgage of the 3rd January 1889 is a bar to the suit is *res-judicata* as against the defendants; and (2) whether plaintiff's suit for a declaration that the land is liable to attachment and sale will lie in view of Section 16 of the Punjab Land Alienation Act of 1900, the said land admittedly belonging to an *Arain* of the Amritsar District and *Araains* of that District having been duly notified, under Section 4 of the Act, as "an agricultural tribe" for the purposes of the Act.

It will be more convenient to dispose first of the *second* of the above mentioned points.

Section 16 (1) of Act XIII of 1900 provides that "no land "belonging to a member of an agricultural tribe shall be sold in "execution of any decree or order of any Civil or Revenue Court, "whether made before or after the commencement of this Act."

From this provision it is clear that inasmuch as the land of such a person cannot be sold in execution of a decree, the Courts should refuse to grant a declaration to the effect that such land is liable to be sold at the instance of a decree-holder, and as Section 16 (1) is applicable to decrees made as well *before* as after the commencement of the Act, we must, in any case, give effect to its provisions, and if we uphold (as we are of opinion that we must) the decision of the lower Courts on the question of *res-judicata*, such part of the decree as declares this land to be liable

to be sold in execution of plaintiffs' decree, will have to be set aside. It is to be noted, however, that the section does not prohibit the attachment in execution of decree of the land belonging to members of an agricultural tribe, and a decree-holder is, therefore, still entitled to claim a declaration that the land of the judgment-debtor, even though the latter happens to be a member of such tribe, is liable to attachment and to be thereafter dealt with as in Section 326, Civil Procedure Code, provided. To this extent, then, the decree of the lower Court does not contravene any provision of Section 16 and may stand.

Before proceeding to discuss the question of *res judicata*, we might briefly refer to two arguments addressed to us by Mr. Shadi Lal and Mr. Rup Lal, respectively. The former urged that an objection founded on Section 16 of Act XIII of 1900 can be advanced only by the member of the agricultural tribe whose land is in dispute, and certainly cannot be pleaded by the latter's alienee who happens to be in possession. We over-ruled this contention as it seems clear to us both from the terms of the section itself and also from the general tenor of the Act, that the Courts are bound to protect, so far as in them lies, the lands of agriculturists against the attacks of their creditors and must give effect to the provisions of the section, no matter by whom the fact that the land in question is the property of an agriculturist, is brought to their notice.

Mr. Rup Lal's contention was that inasmuch as that part of plaintiff's prayer which asks for a declaration of the liability of Muhammad Bakhsh's land to sale must *ex-necessitate* be refused, the only prayer that remains is for a declaration of the liability to attachment. The learned pleader argued that Section 42 of the Specific Relief Act, 1877, precluded the Courts from granting the plaintiff a declaration of that limited kind, inasmuch as it was open to plaintiff to seek "further relief," namely, that the land was also liable to be let out in farm. In our opinion this contention has no force. The property which plaintiff attached has been released from attachment by our order under Section 280, Civil Procedure Code, and plaintiff has now in accordance with the provisions of Section 283 of the Code, instituted a suit for the purpose of establishing the right which he claims to that property, namely, the right of attaching it in execution of his decree, and we do not consider that it was incumbent on him to add to the prayer of his plaint a further prayer that the land should be dealt with in the manner provided by Section 326 of the Code. That is a matter for the executing

Court and not for the Court which passes the decree. The latter is in such cases concerned merely with the question whether or not the property is liable to attachment, and if it holds that it is, the *form* which such attachment is to take will have to be decided by the executing Court.

Adverting now to the question of the applicability of *explanation* 2 of Section 13, Civil Procedure Code, to the circumstances of this case, we are of opinion that the decision of the lower Courts is correct.

Mr. Rup Lal for the appellants argued that it should be held that the *explanation* did not apply in the present case for two reasons, namely, (1), because Lala Wazir Chand who tried the previous suit was a Munsiff of the 3rd class and as such was not competent to hear and decide the present suit, the subject matter of the former being the cancellation of the sale-deed, the consideration of which was merely Rs. 92, while the subject matter of the latter is the cancellation of the mortgage-deed, of which the consideration is Rs. 1,000, and (2), because the title of defendants as based upon the mortgage-deed was inconsistent with, and antagonistic to, that based upon the deed of sale, and defendants were therefore not only not bound, but were legally unable, to plead such alternative titles. These points were argued elaborately and in detail, but after giving the matter our best consideration, we are unable to accept either reason as sound. In the first place, plaintiff's claim, both in the former and in the present suit, is for a declaration that certain property which has been released from attachment and which he values at Rs. 92 is liable to attachment and nonetheless so because defendants plead in bar a certain deed which, they allege, give them rights in the land. It has been held by this Court (*Maya Mal v. Bela Singh* ⁽¹⁾) that for the purposes of jurisdiction, the value of a suit by a defeated decree-holder to establish his right to attach certain property is the value of that right to the plaintiff, and that when the value of the property exceeds the amount of the decree, the value to the plaintiff is limited to the amount of his decree, and when the amount of the decree exceeds the value of the property, the value to the plaintiff is the value of the property. Here the property which the plaintiff wishes to attach has been valued by a commissioner whose report has been accepted (without demur on the part of defendants) by the Court of first instance, at Rs. 93-12-0. The value, therefore, *for jurisdiction purposes*, of the present suit to the plaintiff is below Rs. 100

(¹) 121 P. R., 1890.

and for the purposes it is quite immaterial that the value of the suit to the defendants may be much greater. Lala Wazir Chand was consequently competent in his capacity as Munsif of the 3rd class to hear and decide both the former and the present suits.

As to the second head of the argument, it is settled law that "when a plaintiff claims an estate and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward" (*Srimut Rajah v. Katama Natchia* (1) at page 73). Here defendants admittedly knew of the mortgage-deed when they resisted the claim of the plaintiff in the former suit, and they deliberately decided to resist that claim upon their deed of sale alone, and under these circumstances we cannot but hold that they are now precluded, by virtue of explanation 2 of Section 13, from resisting the present claim upon that deed of mortgage. The cases cited by Mr. Rup Lal (*viz*; *Muttu Chetti v. Muttu Chetti* (2) and *Konerrav v. Gurusav* (3)) do not support his argument and are clearly distinguishable from the case before us, relating as they do to the question whether a plaintiff when suing for relief is bound to base his suit on all the various causes of action which he may claim to possess; no matter how antagonistic such causes of action may be *inter se*. In such cases different considerations arise, but even in the Bombay case *Melville*, Judge, observes (at page 594) "it is possible that the plaintiff might, in his former suit, have made an alternative case, and have prayed that, if the Court should come to the conclusion that the title which he set up was a bad one and that he was not entitled to the relief which he claimed, it should nevertheless award to him a different relief founded upon a different and antagonistic cause of action. The plaintiff might, we say, possibly have been allowed to combine two such grounds of attack in one suit; but we cannot say that he ought to have done so." The rule with regard to a defendant resisting a claim is, as we have pointed out, different, and he is not merely entitled but absolutely bound to resist the claim on every ground which it is possible for him, according to his knowledge, to bring forward. But apart from this, we agree with the learned Judges who decided the case of *Imam Khan v. Ayub Khan* (4) that a claim to possession under an absolute title and a claim to possession under a mortgage title are not so dissimilar as to cause confusion, and should be pleaded in the

(1) 11 Moo. I. A., 50.

(2) I. L. R., IV Mad., 296.

(3) I. L. R., V Bom., 589.

(4) I. L. R., XIX All., 517.

alternative. In that case it was held that even a plaintiff who claimed possession as an owner was bound, if he also had a claim under a mortgage to put forward the latter claim in the alternative, and that if he failed to do so, and his suit for possession as owner was unsuccessful, Section 13 of the Code debarred him from subsequently suing for possession as mortgagee. See also the case of *Ramguttay Surmah v. Abdul Ali* (1).

A fortiori this reasoning would apply to a defendant contesting a claim. We hold, therefore, that the mortgage of the 3rd January 1889 was "a matter which might and ought to have been made a ground of defence" in the former suit between the parties and that it must accordingly be deemed to have been a matter "substantially and directly in issue in such suit" within the meaning, and for the purposes of Section 13 of the Code, and that defendants are precluded from pleading it in bar of the present claim.

For the reasons given, we are of opinion that the decision of the lower Courts upon the main question is correct, but that the appeal must so far be accepted that the decree must be varied in part and the plaintiff be given a decree merely declaratory of his right to attach the property in dispute. We see no reason, however, under the circumstances to deprive the plaintiff of his costs, and we order accordingly that defendants-appellants do pay the costs of this appeal.

No. 5.

Before Mr. Justice Reid.

AMIR CHAND,—(DEFENDANT),—APPELLANT,

Versus

GOBIND SAHAI,—(PLAINTIFF),—RESPONDENT,

Civil Appeal No 845 of 1901.

APPELLATE SIDE. }

Oaths Act, 1873, Section 12—Party agreeing to be bound by oath of other party—Power to withdraw after other party has agreed to take the oath—Effect of such withdrawal—Decision on merits.

Although a party to a suit who agrees to be bound by the oath of the other party is not entitled to withdraw after the other party has expressed his willingness to take the oath required, all that the Oaths Act of 1873 prescribes for the contingency of the party agreeing eventually withdrawing and preventing the other party from taking the proposed oath, is that the fact of the agreement to be bound by the oath and any reason which may be assigned for the subsequent withdrawal should be recorded by the Court

as part of the proceedings, and the suit should be decided on the merits, allowing due weight to the presumption arising from that refusal after considering the reasons assigned.

Mussammat Azima Begam v. Muhammad Bakhsh ⁽¹⁾, *Bawa Suchet Singh v. Ratna* ⁽²⁾, *Ram Narain Singh v. Babu Singh* ⁽³⁾, and *Sawan Mal v. Devi Dial* ⁽⁴⁾, referred to.

Further appeal from the order of Khan Bahadur Abdul Ghafur Khan, Divisional Judge, Multan Division, dated 5th August 1901.

Sukh Dial, for appellant.

Muhammad Shah Din, for respondent.

The judgment of the learned Judge was as follows :—

REID, J.—This was a suit for money due on accounts. The 10th Nov. 1902.
plaintiff-respondent offered to be bound by any statement recorded by the defendant-appellant as to his indebtedness in the respondent's account book.

The offer was accepted by the appellant, and time was allowed for the production of the book by the respondent, who failed to produce it and alleged that the appellant had, after both had left the Court, told him that the proposed form of oath had no binding effect and that he had no objection to recording anything which suited his interests. The Court of first instance dismissed the suit, holding that appellant must be considered to have taken an oath that nothing was due. The lower Appellate Court set aside this decree and remanded the suit under Section 562 of the Code of Civil Procedure, holding that Section 158 of the Code was applicable, the respondent having "by his conduct failed to do an act for which time was granted him." In appeal it is contended that Sections 130 and 136 of the Code apply, and that the suit was rightly dismissed, the Court having ordered the production of a document and the respondent having rendered himself liable to dismissal of his suit for want of production. This contention has, in my opinion, no force.

The production of the book was ordered solely in order to enable the appellant to take the proposed oath, and not in order that the book itself might be evidence in the suit. The failure to produce was, in my opinion, equivalent to failure to take an oath or refusal to be bound by an oath, and the sections relied on are, in my opinion, inapplicable.

⁽¹⁾ 63 P. R., 1881.

⁽²⁾ 31 P. R., 1888.

⁽³⁾ I. L. R., XVIII All., 46.

⁽⁴⁾ 45 P. R., 1898.

In *Mussammat Azima Begam v. Muhammad Bakhsh* ⁽¹⁾ it was held that a party to a suit, who agreed to be bound by the oath of another party, is not entitled to withdraw after the other party has expressed his willingness to take the oath required; and in *Bawa Suchet Singh v. Ratna* ⁽²⁾ it was held that all that the Oaths Act X of 1873 prescribed for the contingency of a party eventually declining to take the proposed oath is that the fact of the agreement to take it and any reason which may be assigned for the subsequent refusal shall be recorded by the Court as part of the proceedings. The judgment proceeded as follows:—
 “From this it may be inferred that the Legislature intended
 “that the Court having to deal with the suit might take the
 “refusal into consideration, and draw a presumption
 “adverse to the party who offered to be bound by the refusal
 “. . . . But such a presumption is open to rebuttal, and its
 “strength or weakness would largely depend on whether the
 “Court was satisfied that the reason alleged by the party. . .
 “for his refusal to take the oath was *bonâ fide*.”

Section 158 of the Code is not, in my opinion, applicable. The Court of first instance should have decided the suit on the merits, giving due weight to such presumption as it found, after considering the respondent's reason for not enabling the appellant to take the proposed oath to exist, and should not, as appears to have been suggested by the lower Appellate Court, have ignored the offer to be bound by the appellant's oath. *Ran Narain Singh v. Babu Singh* ⁽³⁾ supports this view. I see no reason to hold that the proposed form of oath was not admissible under Section 8 of the Oaths Act, and *Bawa Suchet Singh v. Ratna* ⁽²⁾ and *Sawan Mal v. Devi Dial* ⁽⁴⁾ are authority for holding that the suit should have been remanded under Section 562 of the Code.

I allow the appeal to the extent of modifying the order of the lower Appellate Court by directing the Court below to dispose of the suit on the merits, after allowing due weight to the presumption arising from the respondent's refusal to produce his account book, after considering his reasons for that refusal.

The parties will pay their own costs of this Court.

⁽¹⁾ 63 P. R., 1881.

⁽³⁾ I. L. R., XVIII All., 46.

⁽²⁾ 31 P. R., 1888.

⁽⁴⁾ 45 P. R., 1898.

No. 6.

Before Mr. Justice Reid, Chief Judge.

GOPAL SAHAI,—(DEFENDANT),—APPELLANT,

Versus

SHEO KARN DAS,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 456 of 1902.

Execution of decree—"Assets realized by sale or otherwise in execution of a decree"—Money realized under an *ultra vires* attachment—Rateable distribution—Civil Procedure Code, 1882, Section 295.

Held, that money paid by a judgment-debtor into a Court under an order of attachment which was *ultra vires* cannot be treated as assets realized by sale or otherwise in execution of a decree within the meaning of Section 295, Civil Procedure Code. Such a payment being a voluntary one made in order to avoid execution or from a desire to pay a debt due, is not capable of rateable distribution.

Mussammat Mehr Nishan v. Nawabzada Muhammad Kazim Ali Khan ⁽¹⁾, *Hithal Das v. Nand Kishore* ⁽²⁾, *Sheo Karn Das v. Earle* ⁽³⁾, *Sew Bux Bogla v. Shib Chunder Sen* ⁽⁴⁾, *Purshotam Das Tribhovandas v. Mahant Surajbharttee Hari Barthi* ⁽⁵⁾, *Prosonnomoyi Dassi v. Sreenauth Roy* ⁽⁶⁾, and *Gopal Das v. Thunni Lal* ⁽⁷⁾ referred to.

Further appeal from the decree of Captain G. C. Beadon, Divisional Judge, Jullundur Division, dated 16th July 1901. ;

Lal Chand, for appellant.

Beechey, for respondent.

The judgment of the learned Chief Judge was as follows :—

REID, C. J.—The parties are rival decree-holders. A preliminary objection that no appeal under Section 70 (1) (b) of the Courts Act lies, by reason of the suit being a small cause of value less than Rs. 1,000, has no force. 19th June 1902.

Article 26 of the Second Schedule of the Small Cause Courts Act exempts from the jurisdiction of such Courts a suit to compel a refund of assets improperly distributed under Section 295 of the Code of Civil Procedure. The present suit is of that nature.

On the 19th July 1898 the respondent obtained a decree against Surgeon-Major Hudson and Captain Bailey for Rs. 8,530 and Rs. 766 costs, and the appellant on the 3rd July 1899

⁽¹⁾ 35 P. R., 1900.^(*) I. L. R., XIII Calc., 225.⁽²⁾ I. L. R., XXIII All., 106.^(*) I. L. R., VI Bom., 588.⁽³⁾ 40 P. R., 1895.^(*) I. L. R., XXI Calc., 809.⁽⁷⁾ I. L. R., VIII All., 67.

obtained a decree against Surgeon-Major Hudson only for Rs. 9,250 and Rs. 780 costs. Both decrees were passed by the District Judge of Jullundur.

The second decree concluded with the words "The decree drawn according to Army Act."

For the appellant it is contended that this meant that under Section 151 (3) of the Army Act of 1881, 44 and 45 Vict., Cap. 58, repealed in 1895, the Court directed that the whole or part of the sum due should be paid by instalments not exceeding half the pay of the debtor, who then held an appointment, and resided in the Andaman Islands.

Apart from the fact that the reference must be understood to be to the Army Act in force at the date of the decree, which contains no provision corresponding to that in Section 151 (3) above cited, the direction is not sufficiently specific, and this part of the decree could not be executed, by reason of vagueness and uncertainty. *Mussammat Mehr Nishan v. Nawabzada Muhammad Kazim Ali Khan* ⁽¹⁾ does not help the appellant.

I am unable to hold that the above cited addition to the later decree gave it preference over that in favour of the respondent.

On the 27th January 1900, on the application of the appellant, the Jullundur Court ordered that half the pay of Surgeon-Major Hudson be paid into Court on realisation, and Rs. 1,978-8-8, in respect of four months, January, February, March and April 1900, were remitted to that Court and were paid to the appellant.

On the 25th January 1900 the respondent applied for execution by attachment of pay, and mentioned in his application the appellant's attachment, asking for a share in the money realised.

On the 4th June 1900 both prayers were refused, the Court holding that no attachment of property outside its jurisdiction could be ordered.

The question for consideration is whether the assets, of which half is claimed by the respondent from the appellant, were "realised in execution of a decree." Counsel for the appellant contends that the respondent cannot share rateably with his client because he could not have recovered from the judgment-debtor by execution on his own account; and, further, that if the attachment was *ultra vires* the payment must be treated as voluntary.

⁽¹⁾ 35 P. R., 1900.

Of the authorities relied on by counsel for the appellant *Bithal Das v. Nand Kishore* ⁽¹⁾ is distinguishable, the decree-holder having attached property in execution of a decree against a joint Hindu, before the debtor's death. The *ratio decidendi* was that other decree-holders could not profit by the diligence of the attaching creditor, their decrees not being realisable from joint property in the hands of survivors by reason of attachment not having been effected in execution of them during the life of the debtor.

Shri Karan Das v. Earle ⁽²⁾ laid down the rule that a Civil Court executing a decree for money had no jurisdiction to attach a moiety of a judgment-debtor's salary under Sections 266, 268 of the Code, when the debtor as well as the garnishee resided outside the local jurisdiction of the Court. It was not held that the decree-holder could not avail himself of the provisions of Section 223 of the Code.

In *Sew Bux Bagla v. Shib Chunder Sen* ⁽³⁾ Trevelyan, J., said "Section 295 does not compel a judgment-creditor whose debt is satisfied by the debtor to share with other persons money received by him in satisfaction of his judgment." The learned Judge followed *Purshotam Das Tribhokandas v. Mahant Suraj-bharatee Hari Barthe* ⁽⁴⁾, in which it was held that money paid by a judgment-debtor under arrest in satisfaction of the decree against him, did not constitute assets realised by sale or otherwise within the terms of Section 295, and that that section must be read as if the words "from the property of the judgment-debtor" were inserted after the word "realised."

In *Prasannomoyi Dassi v. Sreenauth Roy* ⁽⁵⁾ it was held that rateable distribution can be effected only of the proceeds of a sale in execution under the process of the Court or of assets realised in one of the other modes expressly provided by the Code.

In *Gopal Dai v. Chhumi Lal* ⁽⁶⁾ it was held that rateable distribution could not be effected, under Section 295 of money paid into Court by the debtor for realisation by one decree-holder who had attached his property.

On the authorities cited the Jullundur Court could not order the payment into Court of any part of the debtor's pay, and the fact that the money was so paid does not alter the fact that it was not realised by sale in execution under the process of the Court or

⁽¹⁾ I. L. R., XXIII All., 106.

⁽²⁾ 40 P. R., 1895.

⁽³⁾ I. L. R., XIII Cal., 225.

⁽⁴⁾ I. L. R., VI Bom., 588.

⁽⁵⁾ I. L. R., XXI Cal., 809.

⁽⁶⁾ I. L. R., VIII All., 67.

in one of the other modes expressly provided by the Code. The order was *ultra vires* and must be treated as a nullity, the payment being treated as a voluntary payment, made in order to avoid execution or from a desire to pay a debt due and the respondent was not entitled to rateable distribution. The fact that under Section 223 of the Code the decree might have been transferred to a Court with jurisdiction, does not, in my opinion, benefit the respondent.

For these reasons I decree the appeal and restore the decree of the Court of first instance, dismissing the suit with costs of all Courts.

Appeal allowed.

No. 7.

Before Mr. Justice Reid.

APPELLATE SIDE.

BALDEO SAHAI AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,
Versus
MUL CHAND AND ANOTHER,—(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 54 of 1902.

Contract Act, 1872, Section 62—Contract—Novation—Right of a party to fall back on the original cause of action.

Defendants owed some money to the plaintiffs on book account, they executed certain *hundis* in discharge of that debt. On maturity the *hundis* were dishonoured. The plaintiffs sued the defendants on the original debt, the defence being novation of contract.

Held, that the plaintiffs not having endorsed or lost or parted with the *hundis* under such circumstances as to make the defendants liable upon them to some third parties were entitled to sue on the original debt which had not been extinguished by the fact of the receipt by plaintiffs of the *hundis* by way of security.

Sheikh Akbar v. Sheikh Khan ⁽¹⁾, *Nasib Rai v. Taj Muhammad* ⁽²⁾, *Rahmatulla v. Ganesh Das* ⁽³⁾, and *Udho Shah v. Hira Shah* ⁽⁴⁾ cited and followed.

Miscellaneous further appeal from the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 20th November 1901.

Shadi Lal, for appellants.

Ganpat Rai, for respondents.

The judgment of the learned Judge was as follows:—

29th Nov. 1902.

REID, J.—This is an appeal against an order of remand under Section 562 of the Code of Civil Procedure.

⁽¹⁾ *I. L. R.*, VII Cal., 256.

⁽²⁾ *84 P. R.*, 1885.

⁽³⁾ *82 P. R.*, 1891.

⁽⁴⁾ *71 P. R.*, 1897.

The Court of first instance found that there had been a novation of the original contract between the parties, and dismissed the suit based on book accounts, the plaintiffs having accepted two *hundis* for Rs. 800 each, executed by one of the defendants in favour of Mul Chand, Mutsadi Lal. The first *hundi* was payable after 31 days and the second after 71 days.

It has not been alleged that either of these *hundis* has been discharged.

Mutsadi Lal was examined and deposed that the *hundis* were executed at Delhi, where the suit was instituted. He was not cross-examined or examined by the defendants, and there is no evidence that they were executed elsewhere.

The original plaintiffs were Mutsadi Lal and his minor brother Fakir Chand. On objection taken by the defendants, that Mul Chand, father of the plaintiffs, was a necessary party, he was added as a plaintiff. Counsel for the appellants contends that Mul Chand has been substituted for Fakir Chand and that the *hundis* have been substituted for the book debt, Section 62, illustration (a), of the Contract Act being applicable. This contention has, in my opinion, no force.

Mul Chand was originally not joined as a plaintiff because, according to Mutsadi Lal's allegation, he was an old man and had ceased to join in the partnership transactions. I see no reason to doubt that the family was joint and no evidence to the contrary was adduced.

In *Sheikh Akbar v. Sheikh Khan* (1), Garth, C. J., remarked at page 259, "When a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor on account of the debt, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration." *Naubat Rai v. Toj*

(1) I. L. R., VII Cal., 256.

Muhammad ⁽¹⁾, *Rahmatulla v. Guresh Das* ⁽²⁾, *Udho Shah v. Hira Shah* ⁽³⁾, and *Leake on Contracts*, Edition 3, Chapter VII, are to the same effect. In the 1891 case the authority above cited was followed. It has not been suggested that the plaintiffs parted with the *hundis*. Indeed the Court of First Instance recorded that the *hundis* were produced by the plaintiffs and returned to them. Counsel for the respondents produced two *hundis* which were, he alleged, given to him by his clients as the *hundis* in question, although they were not endorsed as having been produced and returned. This is possibly due to the manner in which the rules provided by the Code of Civil Procedure for the production and admission of documentary evidence are too frequently ignored by Courts in this Province. It is, however, in my opinion, unnecessary to remand an issue as to the identity of the *hundis* with those produced, in the absence of any allegation of liquidation or transfer.

There was, in my opinion, no novation, and the suit can proceed on the book accounts.

Having regard to the dishonesty of the defence set up, the lower Appellate Court was justified in saddling the present appellants with costs. The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 8.

Before Mr. Justice Reid.

BRIJ LAL AND ANOTHER,—(DECREE-HOLDERS),—
PETITIONERS,

Versus

HARJI MAL,—(JUDGMENT-DEBTOR),—RESPONDENT.

Civil Revision No. 311 of 1902.

Revision—Chief Court's powers of—Practice—Punjab Courts Act, 1884, Section 70 (1) (a) as amended.

Respondent became surety under Section 336, Civil Procedure Code, for a judgment-debtor, and undertook to produce him in Court when called upon, and that he should within one month file an application to be declared an insolvent. The judgment-debtor duly applied to be declared an insolvent, but his application was rejected in default of prosecution after one appearance. The decree-holder thereupon applied for the execution of his decree against the surety, which was refused by

⁽¹⁾ §4 P. R., 1885.

⁽²⁾ 82 P. R., 1891.

⁽³⁾ 71 P. R., 1897.

the District Judge on the ground that the obligation of the surety was discharged. The decree-holder preferred an appeal to the Chief Court, and on the Court's deciding that such an order was not appealable,* the decree-holder applied for revision under Section 70 (1) (a) of the Courts Act.

Held, following *Joti Mal v. Coates* (1), that as the decree-holder had an action against the respondent on the surety bond and the question involved was of considerable importance, the matter was not one for the exercise of the extraordinary powers of revision of the Chief Court under Section 70 (1) (a) of the Courts Act.

Banni Mal v. Janna Das (2) distinguished.

Madan Gopal, for petitioners.

Beechey, for respondent.

The judgment of the learned Judge was as follows :—

REID, J.—Counsel for the respondent has taken a preliminary objection that no revision lies, and has cited *Joti Mal v. Coates* (1), in which the rule was laid down that this Court will not, as a general rule, exercise its extraordinary powers of revision under Section 70 (1) (a) of the Courts Act, on the ground of material irregularity or of refusal to exercise jurisdiction, so long as there is any other remedy open to the party professing to be injured whereby he may obtain the relief sought.

29th Nov. 1902

Banni Mal v. Janna Das (2), cited by counsel for the petitioner, is distinguishable, inasmuch as in that case the surety was the applicant and had no other remedy except, possibly, a suit to set aside the order complained of.

It is admitted that the petitioner has an action against the respondent on the surety bond, and the question whether he is entitled to recover the whole or any part of the sum secured is of considerable importance, the sum involved being so large that an appeal from any decree which might be passed in a suit by the petitioner would lie direct to this Court.

A suit is, in my opinion, more appropriate than summary proceedings for the decision of the question involved, and I see no reason for exercising the jurisdiction vested in this Court by Section 70 (1) (a) of the Act.

For these reasons I dismiss this application with costs.

Application dismissed.

* See 72 P. R., 1902.

(1) 15 P. R., 1901.

(2) I. L. R., XV All., 183.

No. 9.

Before Mr. Justice Chatterji and Mr. Justice Harris.

AJUDHIA PERSHAD,—(DEFENDANT),—APPELLANT,

Versus

CHANDAN,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 866 of 1899.

Civil Procedure Code, 1882, Section 316—Sale of immovable property in execution of decree—Sale certificate—Title of auction purchaser who has not obtained a certificate—Pre-emption—Right of pre-emptor to maintain suit before a certificate has been granted—Registration of sale certificate—Registration Act, 1877, Section 17 (o).

At a sale in execution of a decree the defendant purchased certain immovable property; the sale was confirmed, but at the purchaser's own request the certificate was not drawn up and given to him although a draft had been prepared. The plaintiff sued for pre-emption, the defendant pleaded that inasmuch as the certificate of sale had not been granted to him under Section 316, Civil Procedure Code, the suit was premature.

Held, that under the circumstances the confirmation of sale by the executing Court is sufficient to confer a complete title upon an auction purchaser and that a party purchasing property subject to preemption at a sale held in execution of a decree cannot defeat the right of a pre-emptor by asking the Court to omit performance of its statutory duty to grant a certificate after confirmation of the sale.

Clause (o) to Section 17 of the Registration Act expressly exempts a sale certificate granted to the purchaser of immovable property sold by public auction by a Civil or Revenue Officer.

Velun v. Kamrasami ⁽¹⁾, *Tota Prasad v. Nund Kishore Giri* ⁽²⁾, *Khushal Panna Choud v. Bhima Bhai* ⁽³⁾, *Daydu v. Pancham Singh Ganga Ram* ⁽⁴⁾, *Budhu v. Hira* ⁽⁵⁾, and *Than Singh v. Kazim Ali* ⁽⁶⁾ cited.

Further appeal from the decree of H. Maude, Esquire, Divisional Judge, Delhi Division, dated 3rd April 1899.

Madan Gopal, for appellant.

Muhammad Shafi and Ram Chandra, for respondent.

The facts of the case are sufficiently set forth in the judgment of the Court delivered by

22nd Nov. 1902.

CHATTERJI, J.—The parties have not been able to come to an amicable settlement. We have therefore heard counsel for appellant at length, and as he has not been able in our opinion to make

⁽¹⁾ *I. L. R.*, XI *Mad.*, 296.

⁽²⁾ *I. L. R.*, IX *Cal.*, 842.

⁽³⁾ *I. J. F.* XI *Bom.*, 589.

⁽⁴⁾ *I. L. R.*, XVII *Bom.*, 375.

⁽⁵⁾ 27 *P. R.*, 1892.

⁽⁶⁾ 92 *P. R.*, 1893.

a case for interference we proceed to dispose of the appeal without calling on the respondent for a reply.

The facts are briefly these. Ajudhia Pershad, appellant, got a decree against four persons in virtue of two mortgage-deeds for Rs. 865-12-0 with a declaration of lien against the mortgaged lands. The first Court excluded ancillary rights such as *haquq shamilat* from the decree, but on appeal the Divisional Judge made these liable also. In 1896 Ajudhia Pershad applied for sale of the land in execution of his decree, and with the sanction of the Financial Commissioner it was sold without the accessory rights by auction and purchased by the decree-holder for Rs. 555 on 20th July 1897. The sale was confirmed on 14th October 1897. A draft sale certificate was prepared on 11th November, but Ajudhia Pershad objected that the *haquq* had not been included and prayed that the error might be rectified. It was found that the original application for sanction to the Revenue authorities did not include *shamilat* rights and a fresh application was made, and on receipt of sanction these rights were sold on 20th August 1898 and purchased by Ajudhia Pershad for Rs. 545. The sale was confirmed on 5th October 1898 and a certificate of sale, dated 9th November 1898, was prepared which recited the latter sale and its confirmations by the Court and covered the entire property. This certificate was not registered.

The plaintiff filed the present suit for pre-emption of the *khewat* land without any mention of the accessory rights on 19th July 1898. The plea was that the suit was premature, that the land had been sold by mistake without accessory rights which were auctioned on 20th August 1898, *i.e.*, after the institution of the suit for Rs. 545, and purchased by the defendant, that plaintiff could not claim pre-emption only of a portion of the property sold and that in any case plaintiff could only take the whole on payment of Rs. 1,100. Plaintiff's right to pre-empt, however, was admitted.

In replication, plaintiff urged that the accessory rights were necessarily included in the first sale. The first Court after drawing three issues which covered the points in dispute found (1) that the suit was not premature, (2) that the original sale did not include *shamilat* rights, and (3) that nevertheless plaintiff was entitled to pre-empt all that was then sold and gave plaintiff a decree accordingly on payment of Rs. 555. The contention that the suit was premature was based on the fact that no certificate of sale had yet been taken out by the defendant

purchaser and his title had not therefore vested. It was overruled by the first Court.

On appeal the Divisional Judge came substantially to the same findings and upheld the first Court's decree. He, however, excluded from consideration the sale certificate finally obtained by the defendant on the ground that it was unregistered.

Before us the same grounds are again urged by appellant's counsel, and it is contended that the sale certificate did not require registration.

The last point may be disposed of at once. The learned Judge appears to have overlooked the amendment of the Registration Act introduced by Act VII of 1888, which added clause (c) to Section 17 expressly exempting a sale certificate granted to the purchaser of property sold by public auction by a Civil or Revenue Officer from the operation of that section. The learned counsel for the respondent admitted that the certificate does not require registration.

The gist of the argument of appellant's counsel is that the first sale cannot be treated as a valid sale as it was an incomplete transaction and was completed only when the second sale on 20th August took place and that the auction purchaser has no title until he gets a certificate from the Court. He referred to the language of Section 316, Civil Procedure Code, and several authorities in support of his contention.

It is unnecessary to discuss these decisions in detail because none of them appears to cover the case before us. Here the sale was confirmed, but at the purchaser's own request the certificate was not drawn up and given to him although a draft had been prepared. None of the cases cited goes to the length of broadly laying down that after confirmation of the sale the auction purchaser is without any title to the property as against third parties. Counsel's argument is based on certain expressions of opinion contained in some of them as to the meaning of Section 316, Civil Procedure Code, but they do not appear to go to the length contended for by him. Cases under the old Codes of Civil Procedure need not be separately noticed as they do not help the special line of argument here put forward. Similarly cases prior to the amendment of the Registration Law relating to certificates of sale may also be excluded from consideration. Where certificates of sale were drawn up but were not registered though registration was compulsory, it might follow that the exclusion of the certificate is fatal to the auction

purchaser's title though on that point also opinions vary. See *Velan v. Kamarasami* ⁽¹⁾

In *Tara Prasad Myhre v. Nund Kishore Givi* ⁽²⁾ it was held that the confirmation of the sale was sufficient to confer a complete title on the auction purchaser, that the production of such an order was enough for his purposes, and that it was not necessary for him to produce the certificate of sale in order to entitle him to a decree. This was a suit against a third party who had purchased the same property at another auction. In *Khushal Pana Chand v. Bhima Bhai* ⁽³⁾, an order confirming the auction sale was held to complete the title of the purchaser as between parties to the suit. The construction put by Mr. Justice Norris on the words "as far as regards the parties to the "suit and persons claiming through or under them" in Section 316, Civil Procedure Code, that persons, not parties, to the suit necessarily come under the rule seems to be doubted in *Dagdu v. Pancham Singh Gangi Ram* ⁽⁴⁾ by Mr. Justice Jardine who apparently takes the same view of their meaning as we should be disposed to do from their ordinary grammatical sense.

The principle laid down in *Khushal Pana Chand's* case was followed by this Court in *Budhu v. Hira* ⁽⁵⁾, and in *Than Singh v. Kazim Ali* ⁽⁶⁾. In the latter case the sale took place on 27th March 1884, but the certificate of sale was not drawn up till 9th April 1888. In 1887 the judgment-debtor sold the house to a third party and in a suit by the auction purchaser to recover the property sold from the vendee of the judgment-debtor it was held that the omission of the Court to grant a certificate at the proper time or to put the proper date on it should not prejudice the plaintiff. If the want of a certificate is not fatal as between parties to the suit and their representatives to whom the words of the section primarily apply, the same view may be taken as respects third parties as well without much danger of going contrary to the intention of the section.

We doubt very much whether it is competent to the defendant to deny that he has any title as vendee to the property in suit as the sale has been confirmed as required by Section 314, Civil Procedure Code, and the purchase money has been paid. The judgment-debtors, the original owners, do not set up any such contention, and it is the vendee who is repudiating his own title.

⁽¹⁾ *I. L. R.*, XI Mad., 296.

⁽²⁾ *I. L. R.*, IX Cal., 842.

⁽³⁾ *I. L. R.*, XII Bom., 589.

⁽⁴⁾ *I. L. R.*, XVII Bom., 375.

⁽⁵⁾ 27 P. R. 1892.

⁽⁶⁾ 92 P. R. 1893.

He does not dispute that that there has been in fact an auction sale of the land and its confirmation on the dates given above. Nor can he deny that the second sale related only to the accessory rights, and that he has paid a price only for them at that sale. In his petition to the execution Court, dated 6th October 1898, asking for a certificate, he recites the fact of the two sales and their dates. No legal quibble can undo these facts, and we do not think Section 316, Civil Procedure Code, can have this effect.

Further, it appears that a certificate of sale was drawn up on 9th November 1898, *i. e.*, before the first Court gave its decree. The law imperatively requires that the Court should draw up a certificate of sale as regards the first sale, and in fact it did offer to do so and sent a draft to the defendant for his inspection, and it was at his instance that its preparation was deferred. Under the circumstances the provisions of Section 316 should be held to have been sufficiently complied with. We hesitate to hold that a party purchasing property subject to pre-emption at a Court auction may defeat the right of pre-emption by asking the Court to omit performance of its statutory duty to grant a certificate after confirmation of the sale, and that the Court's breach of duty has this effect. Lastly, the certificate as finally drawn up should have recited the two sales with their dates and should be, by operation of Section 316, held to bear those dates. The Court's omission to draw it up in this form in violation of the express provisions of the law ought not to have the effect of prejudicing the plaintiff. On this view the certificate should, as respects the sale of the disputed property, bear the date 14th October 1897 when the sale was confirmed, and this would effectually destroy the ground of appellant's contention before us. In the interests of justice in a pure matter of form like this we have no difficulty in holding that what was imperatively required by law to be done by the Court was actually done.

We hold therefore that the claim ought to succeed.

As respects costs we see no ground to interfere. In the first Court the plaintiff no doubt said in his replication that the sale included accessory rights, but he did not appeal to the Divisional Judge and abandoned all contention on that head when the Court decided against him. Considering the highly technical line of defence taken, plaintiff cannot be blamed for putting forward this contention. It is not shown that defendant offered to forego all contest if plaintiff paid Rs. 1,100 for the

two kinds of property. Plaintiff after the confirmation of the second sale has sued for pre-emption of the *shamilat* rights also.

The appeal fails on all points and is dismissed with costs.

Appeal dismissed.

No. 10.

Before Mr. Justice Anderson.

MINA MAL,—(PLAINTIFF),—APPELLANT,

Versus

KANAK MAL AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 453 of 1902.

Jurisdiction—Place of suing—Suit to recover money paid in Delhi on hundis sent by defendants to Delhi and there accepted and paid by the plaintiff—Civil Procedure Code, 1882, Section 17.

The plaintiff, a banker in Delhi, remitted Rs. 5,000 from Delhi to Ajmere at defendants' request, and received from the defendants *hundis* drawn on their firm at Bombay in satisfaction of this loan which were subsequently dishonoured and yielded no return. The plaintiff thereupon filed a suit in Delhi and claimed to be reimbursed. The Delhi Court declined jurisdiction, holding that as the *hundis* were made payable at Bombay the Court there alone had jurisdiction to hear the suit.

Held, that under the provisions of Section 17, Civil Procedure Code, the Delhi Court had jurisdiction to entertain the suit. As the plaintiff expended money on defendants' behalf at Delhi, he might with reference to the ordinary application of Section 49 of the Contract Act naturally expect to be reimbursed there, and the fact that the defendants gave him *hundis* on Bombay which had been accepted in Delhi made no real difference.

Shirji Ram v. Hem Raj ⁽¹⁾ and *Devi Dyal v. Hari Chand* ⁽²⁾ distinguished.

Muhammad Shafi v. Karamat Ali ⁽³⁾ referred to.

*Miscellaneous first appeal from the order of T. P. Ellis, Esquire,
District Judge, Delhi, dated 12th May 1902.*

Lal Chand and Sangam Lal, for appellant.

Browne, for respondents.

The judgment of the learned Judge was as follows:—

ANDERSON, J.—This was a case in which plaintiff claimed Rs. 5,000 and interest on account of money advanced on the security of *hundis* forwarded to him by defendants which were subsequently dishonoured and yielded no return. 12th Nov. 1902.

⁽¹⁾ 57 P. R., 1900, F. B. ⁽²⁾ 79 P. R., 1902,
⁽³⁾ 76 P. R., 1896.

The Delhi Court has declined jurisdiction, holding that, as the *hundis* were made payable at Bombay, the Court there alone had jurisdiction to hear the suit. *Shirji Ram v. Hem Raj* ⁽¹⁾ was relied on as an authority for holding this view.

In appeal it is urged that the contract for loan and repayment of money was made at Delhi and that, with reference to the provisions of Section 17, Civil Procedure Code, Explanation III, clause I, this confers jurisdiction on the Court there independently of clause III of the same Explanation. This point, it is argued, was not considered by the District Judge and never decided by him.

With regard to the ruling of *Shirji Ram v. Hem Raj* ⁽¹⁾, it was argued that the finding there was to the effect that the contract was made at Karachi and the *hundi* was also payable there, hence it was held that the fact that the *hundi*, which was subsequently dishonoured, had been endorsed at Dera Ismail Khan, did not give jurisdiction to the Court there, and that case is consequently distinguishable from the case now under consideration.

On reference to the plaint and pleadings I find that plaintiff, at defendants' request, remitted Rs. 5,000 from Delhi to Ajmere, that he received from defendants *hundis* drawn on their firm at Bombay in satisfaction of this loan, and that he claimed to be reimbursed because the *hundis* were dishonoured and so practically worthless.

In replication plaintiff's pleader made use of the term "refund" to which the District Judge seems to take exception as an attempt to alter the nature of the suit and to claim to recover the value of the notes remitted instead of claiming payment of the *hundis*.

There is apparently some confusion here. *Hundis* are not exactly the same as English Bills or Cheques, but partake very largely of the nature of bonds, and there is nothing irregular in the creditor claiming a refund of money advanced by him which may have been secured by a *hundi* in the same way that he might claim repayment of a bond which his debtor could not discharge. As plaintiff joined issue on all the contentions raised by the pleadings, the Court could not properly exclude the question of plaintiff's right to a refund although not specifically mentioned in the plaint.

⁽¹⁾ 57 P. R., 1900, F. B.

As regards the question of place where the contract was made, I think it clear that, since plaintiff expended money on defendants' behalf at Delhi, he might, with reference to the ordinary application of Section 49 of the Contract Act, naturally expect to be reimbursed there and defendants' forwarding him *hundis* on Bombay makes no real difference. In ordinary course these *hundis* would have been negotiated in Delhi and would have yielded proceeds there and the fact that, owing to defendants' want of credit, the *hundis* were dishonoured and eventually yielded no profits does not alter the case. The *hundis* were accepted at Delhi which, according to the *dictum* in *Muhammad Shafi v. Karamat Ali* ⁽¹⁾, page 239, makes Delhi liable to be regarded as the place of contract, and this is an additional reason for holding that the Court there had acquired jurisdiction in the cause.

It is not necessary to consider the question of plaintiffs' position as commission agents, as the question raised is not one of their liability to render account to a principal where it has been held in *Devi Diul v. Hari Chand* ⁽²⁾, and other rulings that, in the absence of an agreement to the contrary, this can be enforced by suit only at the commission agents' residence.

On the whole, I think, there can be no doubt that, under the provisions of Section 17 of the Civil Procedure Code, the Court of Delhi had jurisdiction to entertain the suit and should not have returned the plaint.

The appeal is accepted, the order of 12th May 1902 being set aside, and the case is remanded for hearing and disposal according to law. Plaintiff to get costs.

Appeal allowed : case remanded.

No. 11.

Before Mr. Justice Clark, Chief Judge.

HAZURI MAL,—(PLAINTIFF),—APPELLANT,

Versus

KUTAB-UD-DIN AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 436 of 1902.

Registration—Suit for compulsory registration of a document—Execution admitted but fraud and misrepresentation pleaded—Power of Court to inquire the validity of such document—Registration Act, 1877, Section 74.

In a suit under Section 77 of the Registration Act where the defence had admitted the execution of a deed but pleaded that it was executed

} APPELLATE SIDE.

(1) 76 P. R., 1896. (2) 79 P. R., 1902.

under fraud or misrepresentation and without free consent, *held*, that the plaintiff was entitled to the decree asked for. In suits under Section 77 of the Registration Act the Courts are only authorized to consider the question of execution, and have no authority to go into any matter affecting the validity of the document sought to be registered.

Balambal Ammal v. Arunachala Chetti ⁽¹⁾ and *Raj Lakhi Ghose v. Debendra Chundra Mojumdar* ⁽²⁾, cited.

Further appeal from the decree of Kazi Muhammad Aslam, C.M.G., Divisional Judge, Jhelum Division, dated 21st December 1901.

Sukh Dial, for appellant.

The judgment of the learned Chief Judge was as follows :—

15th Dec. 1902.

CLARK, C. J.—This is a suit to enforce the registration of a mortgage under Section 77 of the Registration Act (III of 1877). The Courts have dismissed the suit, holding that, as far as one of the executants, Mussammat Nur Bibi, is concerned, the deed was executed under fraud or misrepresentation and without free consent.

This is a wrong view of the law, as the document was executed, registration should have been directed and the executant left to contend that the document was voidable for above reasons. *Balambal Ammal v. Arunachala Chetti* ⁽¹⁾ and *Raj Lakhi Ghose v. Debendra Chundra Mojumdar* ⁽²⁾. Under Sections 14 and 19 of the Contract Act, an agreement obtained without free consent is a contract voidable at the option of the person who did not give free consent, but it is not a void contract.

In the Calcutta case it was pointed out that a great anomaly might arise if registration was not directed, and this would happen in this case.

The other executant of the mortgage was Kutab-ud-din, and it is not held by the Courts that the mortgage was not executed by his free consent, they hold that he combined with plaintiff to defraud Mussammat Nur Bibi in order to discharge a debt which he owed to plaintiff.

Now Kutab-ud-din is the reversioner of the land mortgaged, but, if the mortgage is not registered, it would not be admissible in evidence to charge Kutab-ud-din's interest on the land.

The mortgage having been executed must be registered, its validity may be contested either in a separate suit, or otherwise, by the executants.

⁽¹⁾ I. L. R., XVIII Mad., 255.

⁽²⁾ I. L. R., XXIV Calc., 668.

I accept the appeal with costs throughout and direct the mortgage in suit to be registered.

Appeal allowed.

No. 12.

Before Mr. Justice Reid.

MUSSAMMAT JANNO,—(DEFENDANT),—APPELLANT,

Versus

RAFIK KHAN AND ANOTHER,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 516 of 1902.

Res judicata—Omission or addition of parties.

The plaintiffs obtained a decree against the present defendant in 1897 in the Court of the Divisional Judge to the effect that the defendant be restrained from using a certain door and certain *parwalas* except for the purpose of discharging rain water, with a direction that, if the defendant should thereafter use any of the said *parwalas* for the discharge of water from the privy, the plaintiff might claim to have such *parwala* or *parwalas* closed. In 1901 the plaintiffs again sued the defendant on the allegation that she had been using the door and one of the *parwalas* contrary to the terms of the former decree and asked that they might be closed. The defendant having pleaded that the plaintiffs were not the sole owners of the lane, two other persons were added as defendants. The first Court decreed the plaintiffs' suit in respect to the closing of the *parwala*, but dismissed the claim with respect to the door, holding that the former suit was not a bar to the re-opening of the point or question in dispute, as the parties to the suit were not the same. On appeal the Divisional Judge held that the point or question in dispute was *res judicata*, and decreed the claim in full. On further appeal to the Chief Court the defendant contended (i) that the question in dispute was not *res judicata*, as the parties in the two suits were different, and all the necessary issues in the previous suit were not determined by the first Court, and (ii) that the only remedy of the plaintiffs was by execution of their former decree.

Held (i) that the question in dispute between the parties was *res judicata*, the omission or addition of parties in a former or subsequent action making no difference where the parties to the subsequent action were before the Court in the previous action, and the plea that in the previous suit the Divisional Judge had determined several points which were not decided by the first Court having no force, inasmuch as the decision on those points could be arrived at on the pleadings and the evidence on the record:

(ii) that having regard to the form of the decree in the previous suit, the present claim was not barred by any rule of law.

Gopal Das v. Gopi Nath Sircar ⁽¹⁾ cited.

⁽¹⁾ *XII Calc., L. R.*, 38.

Further appeal from the decree of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 21st January 1902.

Muhammad Shafi, for appellant.

Bhagwan Das, for respondents.

The judgment of the learned Judge was as follows :—

6th Dec. 1902.

REID, J.—The plea that the decree of 11th October 1897 does not make the question of the respective rights of the parties *res judicata* has no force. The respondents sued the appellant for the closing of the door and four water spouts now in suit. The appellant pleaded that the respondents were not sole owners of the lane on to which the door opened and the spouts discharged, and two other persons, alleged by her to be co-owners, were added as defendants, the plaint being amended. The lower Appellate Court passed the decree set out below :—

“A decree be and hereby is given that the plaintiffs are entitled to an injunction, restraining defendants using the new door as a way to the plaintiffs’ lane and also restraining the defendants from using the four *parwalas* A, B, C, D, shown in plan in the judgment, for any purposes except rain water.

“It is further ordered that if after this they continue using any *parwala* for escape of water from the privy, the plaintiffs can claim to have such *parwala* closed.”

I see no reason for holding that this decree did not finally decide that the appellant could not use the door in suit as a way to the lane, or the spouts in suit for the discharge of latrine water.

The fact that the alleged co-owners of the lane were added as defendants to the present suit does not prevent the above question being *res judicata* between the appellant and respondents, *res judicata* being as remarked in *Gopal Das v. Gopi Nath Sircar* (1), a personal matter between the parties and, so far as those parties are concerned, the question is concluded for ever.

The next plea that there can be no *res judicata* because the only issue in the Court of first instance in the previous suit was as to the antiquity of the door and spouts, has no force. The appellant did not then plead that the respondents were not owners of the lane, and the fact that the lower Appellate Court propounded several points for decision did not necessitate a

(1) XII Calc., L.R., 38.

remand to the Court of first instance inasmuch as the decision of those points could be arrived at on the pleadings and the evidence on the record.

The last plea, that the only remedy of the appellants was by execution of decree not by suit, has, in my opinion, no force having regard to the form of the decree of the lower Appellate Court in the previous suit.

That decree gave the appellant a *locus poenitentiae* and anticipated that execution, in accordance with the provisions of Section 260 of the Code of Civil Procedure, of the decree then passed would not afford adequate relief in the event of the injunction decreed being disobeyed.

The suit is not in my opinion barred by any rule of law, and the questions in dispute are *res judicata*.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 13.

Before Mr. Justice Reid.

SAFDAR JANG,—(DEFENDANT),—APPELLANT,

Versus

SHANKAR SINGH,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE.

Civil Revision No. 938 of 1902.

Revision—Chief Court's powers of revision—Revision from a decree in a suit to recover possession under Section 9 of the Specific Relief Act.

Held, that a decree in a suit for the recovery of possession under Section 9 of the Specific Relief Act in favour of the plaintiff is not open to revision by the Chief Court, on the ground that the Court below has misapprehended and misrepresented the evidence, oral and documentary, on the record where, on the allegations contained in the plaint, the plaintiff had a cause of action and the Court had jurisdiction to entertain the suit, and the errors attributed by the petitioner to the Court below were intrinsic to the inquiry and decision.

Hira Singh v. Bhana ⁽¹⁾, *Joti Mal v. Coates* ⁽²⁾, *Guise v. Jaisraj* ⁽³⁾, *Shiva Nathaji v. Joma Kashinath* ⁽⁴⁾, *Bhundal Panda v. Pandol Pos Potil* ⁽⁵⁾, and *Kashinath Sukharam v. Nana* ⁽⁶⁾, cited. *Narain Das v. Manohar Lal* ⁽⁷⁾, *Sant Singh v. Ghasita* ⁽⁸⁾, *Tarini Mohan Mozumdar v. Gunga Prosad Churkerbutty* ⁽⁹⁾, and *Sonaton Shome v. Sheikh Helim* ⁽¹⁰⁾, referred to.

⁽¹⁾ 9 P. R., 1894.

⁽⁹⁾ I. L. R., XXI Bom., 731.

⁽²⁾ 15 P. R., 1901.

⁽⁷⁾ 21 P. R., 1898, F. B.

⁽³⁾ I. L. R., XV All., 405.

⁽⁸⁾ 21 P. R., 1902.

⁽⁴⁾ I. L. R., VII Bom., 341.

⁽⁹⁾ I. L. R., XIV Calc., 649.

⁽⁵⁾ I. L. R., XII Bom., 221.

⁽¹⁰⁾ 6 Calc., W. N., 616.

*Petition for revision of the decree of W. A. Harris, Esquire,
District Judge, Amritsar, dated 13th March 1902.*

Muhammad Shah Din, for petitioner.

Madan Gopal and Todar Mal, for respondent.

The judgment of the learned Judge was as follows :—

12th Dec. 1902.

REID, J.—The question for decision is whether a decree in a possessory suit under Section 9 of the Specific Relief Act, in favour of the plaintiff, is open to revision by this Court on the ground that the Court below has misapprehended and misrepresented the evidence, oral and documentary, on the record.

In support of a preliminary objection that revision does not lie counsel for the respondent cites *Hira Singh v. Bhana* ⁽¹⁾, *Joti Mal v. Coates* ⁽²⁾, *Shiva Nathaji v. Joma Kashinath* ⁽³⁾ at page 372, *Bhundal Panda v. Pandol Pos Potil* ⁽⁴⁾, *Kashinath Sakham Kulkarni v. Nana* ⁽⁵⁾, and *Guise v. Jaisroj* ⁽⁶⁾.

Counsel for the petitioner cites *Narain Das v. Manohar Lal* ⁽⁷⁾, *Sant Singh v. Ghasita* ⁽⁸⁾, *Tavini Mohan Mozumdar v. Gunga Prosad Chuckerbutty* ⁽⁹⁾, and *Sonaton Shome v. Sheikh Helim* ⁽¹⁰⁾.

The two last cited authorities appear, from the reports, to deal with cases in which the Court had interfered under Section 15 of the Charter, and it was held that on the plaint in each case the plaintiff had no cause of action under Section 9 of the Specific Relief Act, the allegation in the plaint being that he was in constructive, not in physical, possession. In *Narain Das v. Manohar Lal* ⁽⁷⁾, it was held by Roe, C.J., that this Court should in exceptional cases interfere in revision, although the aggrieved party had a remedy by suit. In *Sant Singh v. Ghasita* ⁽⁸⁾ the Court interfered in revision with an order which was *ultra vires* and without authority, although the petitioner had failed to appeal from a subsequent decree of the Court below based on the petitioner's failure to obey that order.

The authorities cited for the respondent are more in point.

In *Hira Singh v. Bhana* ⁽¹⁾ it was held that, however erroneous a decision might be upon the merits, whether in conclusions drawn from the evidence or in the application of the law to the facts, it is not an irregularity to give a wrong decision upon the merits. In *Joti Mal v. Coates* ⁽²⁾, it was held that this

⁽¹⁾ 9 P. R., 1894.

⁽²⁾ 15 P. R., 1901,

⁽³⁾ I. L. R., VII Bom., 341, F. B.

⁽⁴⁾ I. L. R., XII Bom., 221.

⁽⁵⁾ I. L. R., XXI Bom., 731.

⁽⁶⁾ I. L. R., XV All., 405.

⁽⁷⁾ 21 P. R., 1898, F. B.

⁽⁸⁾ 21 P. R., 1902.

⁽⁹⁾ I. L. R., XIV Calc., 649.

⁽¹⁰⁾ 6 Calc., W. N., 616.

Court will not, as a general rule, exercise its revisional powers so long as the injured party has another remedy. *Guise v. Jais-raj* ⁽¹⁾ is to the same effect.

In *Shiva Nathaji v. Joma Kashinath* ⁽²⁾, above cited, at page 373, it was held that where a decree or order of a subordinate Court is declared by the law to be for its own purposes final or conclusive, though in its nature provisional, as subject to displacement by a decree in another more formal suit, the Court will have regard to the intention of the legislature that promptness and certainty should, in such cases, be in some measure accepted instead of judicial perfection; and, where the alleged or apparent error consists in a misappreciation of evidence, or misconstruction of the law, intrinsic to the inquiry and decision, it will respect the intended finality, and will intervene peremptorily only when it is manifest that, by the ordinary and prescribed method, an adequate remedy, or the intended remedy, cannot be had.

In *Bhundal Panda v. Pandol Pos Potil* ⁽³⁾, above cited, the Court found that the Court below had jurisdiction under Section 9 of the Act, the right claimed coming within the denomination of movable property, and declined, on the ground that the injured party had a remedy by suit, to deal with a well founded objection to the procedure of the Court below.

Kashinath Sukharam Kulkarni v. Nana ⁽⁴⁾, above cited, is to the same effect, though the suit was not under the Specific Relief Act.

The holder of a possessory decree can be ejected by the holder of a decree in a suit in ejectment based on title, and on the authorities cited the petitioner has shown no cause for interference in revision. The fact that he will have to establish his title affords no ground for interference.

On the allegations contained in the plaint the Court below had jurisdiction to entertain a suit under Section 9 of the Act, the plaintiff had a cause of action, and the errors attributed by the petitioner to the Court below are intrinsic to the inquiry and decision.

The application is rejected with costs.

Application dismissed.

⁽¹⁾ *I. L. R.*, XV *All.*, 405.

⁽³⁾ *I. L. R.*, XII *Bom.*, 221.

⁽²⁾ *I. L. R.*, VII *Bom.*, 341, F. B.

⁽⁴⁾ *I. L. R.*, XXI *Bom.*, 731.

No. 14.

Before Mr. Justice Reid and Mr. Justice Robertson.

APPELLATE SIDE, {

KHAIRU AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

FATTU AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 974 of 1899.

Custom—Alienation—Gift by sonless proprietor—Awans of mauza Dhanal, Jullundur District—Competency of sonless proprietor to make a gift to his daughter and her son in the presence of his collaterals in the third degree.

In a case, the parties to which were Awans of mauza Dhanal in the Jullundur *tahsil*, found, that a gift of ancestral land by a sonless proprietor in favour of his daughter and her son was valid by custom in the presence of agnates in the third degree.

Aulia v. Alu ⁽¹⁾, *Sher Muhammad v. Phula* ⁽²⁾, *Nura v. Tora* ⁽³⁾, and *Ali Muhammad v. Dulla* ⁽⁴⁾ referred to.

Further appeal from the decree of A. Kensington, Esquire, Divisional Judge, Jullundur Division, dated 14th April 1899.

Browne, for appellants.

Vishnu Singh, for respondents.

The judgment of the Court was delivered by

20th Nov. 1902.

REID, J.—The finding on remand is in favour of the appellants.

Both Courts below are now agreed that the gift in suit, by a sonless Awan of mauza Dhanal in the Jullundur *tahsil* to his daughter and her son, was valid in the presence of collaterals in the third degree from the common ancestor.

The only authority cited against this finding is a decision of the Additional Divisional Judge, Jullundur, of the 11th December 1900, which dealt with a mortgage to a stranger.

Against this there is a decision of the Divisional Judge, Jullundur, of the 1st November 1897, dealing with a gift to a son's daughter. *Aulia v. Alu* ⁽¹⁾, *Sher Muhammad v. Phula* ⁽²⁾, *Nura v. Tora* ⁽³⁾, and *Ali Muhammad v. Dulla* ⁽⁴⁾ have been cited by the lower Appellate Court in support of its finding. We see no reason to differ from that finding, and we decree the appeal with costs, restoring the decree of the Court of first instance.

Appeal allowed.

⁽¹⁾ 49 P. R., 1898.

⁽²⁾ 9 P. R., 1899.

⁽³⁾ 46 P. R., 1900.

⁽⁴⁾ 26 P. R., 1901.

No. 15.

Before Mr. Justice Chatterji and Mr. Justice Harris.

LABH SINGH,—(PLAINTIFF),—APPELLANT,

Versus

GOPI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 689 of 1899.

Custom—Alienation—Suit by reversioner to enforce his right in respect to land on the ground that the alienation had been made without necessity which alienation had already been challenged by his ancestor on the ground of pre-emption only—Locus standi—Waiver—Necessity.

One M. S. sold half of his land to the defendants in 1862, whereon the grandfather of the present plaintiff brought a suit to enforce his right of pre-emption, but his suit was eventually dismissed as he was unable to deposit the purchase-money. Shortly after M. S. mortgaged the remaining half of his land and the grandfather of the plaintiff again brought a suit which was compromised between the parties, the plaintiff's grandfather paying the mortgage-money and interest to the mortgagees.

In neither of these suits did the plaintiff's grandfather challenge the power of M. S. to sell, or alleged that the sale or mortgage was without consideration or necessity, and as a fact he finally agreed to pay the amount mentioned in the purchase-deed, and in the second he actually took over the mortgage. In 1897 the plaintiff filed the present suit in respect of the sale in 1862 on the ground that it was without necessity and did not bind him.

Held, that the plaintiff's grandfather by bringing his suit for pre-emption on the sale in dispute abandoned any right he had to challenge it on the ground of want of necessity or other reason sufficient to make it voidable by him. Such a suit raised a presumption, which of course was not conclusive, that the sale was not bad on the ground of necessity, but it necessarily waived all right to set it aside for want of necessity, and that the plaintiff was bound by the waiver on the part of his grandfather, and on that account precluded from succeeding in the present claim.

Held, also, that the above facts certainly establish that there is some proof that the sale was not an improper one and was for necessity, and that in such cases if conclusive evidence as to necessity was not forthcoming it was due to the plaintiff's laches and delay in bringing the suit. That it would be unjust to expect the purchaser's sons and grandsons to be able to supply strict proof in 1897 of the reasons which led the seller to transfer his land in 1862.

Further appeal from the decree of D. C. Johnstone, Esquire,

Divisional Judge, Lahore Division, dated 4th March 1899.

Morton and Sangam Lal, for appellant.

Beechey, for respondents.

The judgment of the Court was delivered by

CHATTERJI, J.—This is a suit to recover possession of land sold 10th Dec. 1902,

by one Mahtab Singh in 1862, by a person who is a descendant of the seller's great-grandfather Sajan Singh, on the ground that the sale was without necessity and does not bind him. It appears that in August 1864 Kahan Singh, grandfather of the plaintiff, sued for pre-emption, and in those proceedings he did not challenge the power of Mahtab Singh to sell, or allege that the sale was without consideration or necessity, and he finally agreed to pay the price stated in the deed. He failed, however, to pay the money into Court, though time was allowed him, and the suit was dismissed. In 1866 Mahtab Singh mortgaged the remainder of his land to the defendants for Rs. 350, and Kahan Singh again claimed pre-emption, and, by an amicable settlement with the latter in December that year, was allowed to redeem the land and to take possession on payment of the mortgage-money and interest. Mahtab Singh died about five years before the institution of the present suit.

The first Court held that plaintiff was bound by his grandfather's act and could not sue, and that the sale was for valid necessity, and dismissed the claim. The Divisional Judge upheld the decree on the second ground, being of opinion that the proof of necessity adduced by the defendants must be held to be sufficient under the circumstances of the case. He thought that the suit of Kahan Singh for pre-emption did not create an estoppel, but was at least an admission that the alienation was not an improper one.

These grounds are challenged before us in appeal. We are disposed to think that Kahan Singh, by bringing his suit for pre-emption on the sale by Mahtab Singh, abandoned any right he had to challenge it on the ground of want of necessity, or other reason sufficient to make it voidable by him. Such a suit raised a presumption which of course was not conclusive, that the sale was not bad on the ground of necessity, but it necessarily waived all right to set it aside for want of necessity. We are disposed to think also that plaintiff is bound by the waiver on the part of his grandfather. It is not necessary to decide in this case whether under Customary Law the mere silence of an ancestor with reference to an alienation that injures his reversionary right to the property transferred will bind his descendants, but here there was not merely silence or inaction, but positive action in order to preserve those rights. The person in enjoyment of property, or entitled to the right to object to the alienation, must be allowed a certain latitude of judgment as to the mode

in which the property or the right should be protected when invaded or put in jeopardy by others, and in our opinion his successors and descendants must be held to be bound by the action so taken by him. It would be intolerable, and would put an end to all finality in proceedings in a Court of Justice, if it were otherwise. This may best be illustrated by a concrete example, suppose a landowner governed by Customary Law is sued in respect of land held by him by some one claiming to be a relation of the last owner and to be a co-heir. He finds the claim indisputable and thinks it best to admit it, and a decree is passed against him, and the successful claimant thereafter holds the land for many years. Should his descendants or collateral heirs be allowed to ignore the decree after his death, and alleging that the admission was unauthorized and amounted to waste of the property to sue for recovery of possession of the land decreed? A considerable limitation would be introduced in the rule of *res judicata* if this is allowed. Had Kahan Singh obtained a decree for pre-emption and recovered the property on payment of the price, would the plaintiff have been allowed to set aside the decree on the ground that it was an act of waste which prejudiced his rights? What difference does it make that no decree was obtained in this case because the purchase-money was not deposited. We think therefore that Kahan Singh's waiver binds the plaintiff who is on that account precluded from making the present claim.

But assuming that the act of Kahan Singh does not bar the suit, it certainly is some proof that the sale was not an improper one, and was for necessity. There is evidence that Rs. 180 were due to one Shahzada. If further evidence as to necessity is not forthcoming, it is due to the plaintiff's laches and delay in bringing the suit. It is unjust to expect the purchaser's sons and grandsons to be able to supply strict proof in 1897 of the reasons which led the seller to transfer his land in 1862. There is no necessary presumption that the sale was an improper one, or without necessity, and Kahan Singh's own conduct is the best evidence of this. In the former suit he did not urge that sale was made without necessity or without consideration, but merely that it ought to have been made to him. We agree with the lower Courts that under the circumstances the *onus* of proof of necessity, if it is on the defendants, has been sufficiently discharged.

The appeal is dismissed with costs.

Appeal dismissed.

No. 16.

Before Mr. Justice Reid and Mr. Justice Robertson.

KALA SINGH,—(PLAINTIFF),—APPELLANT,

Versus

BUTA SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 520 of 1902.

APPELLATE SIDE. }

Custom—Inheritance—Right to succeed to wife who has inherited from her father—Ancestral property.

Held, that among Hindu Jats of the Moga *tahsil*, Ferozepore District, a husband is not entitled to succeed to the ancestral property in possession of his wife inherited from her father, especially where her possession was only permissive.

Lehna v. Mussammat Thakri ⁽¹⁾ referred to.

Further appeal from the decree of T. J. Kennedy, Esquire, Divisional Judge, Ferozepore Division, dated 4th June 1902.

Sham Lal, for appellant.

Browne, for respondents.

The judgment of the Court was delivered by

26th Nov. 1902.

REID, J.—The question for decision is whether the appellant is entitled to possession of land situate in the Mogha *tahsil*, Ferozepore, which was ancestral in the hands of his wife's father, and on the death of the father was in the possession of the wife's mother, and on her death was in the possession of the wife.

The appellant alleged that his wife, Mussammat Rami, was absolute owner of the land in suit, that he was absent from home when she died in 1900, and that the respondents took possession on her death during his absence.

He has never alleged that he was *khanadamad*.

On the death of Hukm Singh, father of Mussammat Rami and owner of the land in suit, mutation was effected in favour of his widow Mussammat Ghamai. In 1852 the appellant was recorded in the revenue records as being in possession of the land, as son-in-law of Mussammat Ghamai. At that date a son of his was alive. On the death of Mussammat Ghamai in 1864 mutation was effected in favour of Mussammat Rami, the

⁽¹⁾ 32 P. R., 1895.

patwari reporting that there were no other near relations. One of the defendant-respondents is great-grandson of Jagraj Singh, founder of the village, and grandfather of Hukm Singh, while the other defendant-respondents are great-great-grandsons of Jagraj Singh.

It is admitted that Mussammat Rami continued to reside in her father's house after her marriage, and this fact accounts, we doubt not, for her being allowed to be recorded as owner of the ancestral land after her mother's death, though married. Article 270 of Rattigan's "Digest of Customary Law," relied on for the appellant, applies only to a woman's personal property and does not apply to ancestral land in her possession as heir or successor of her father. The entry at page 18 para. IV of the Moga Tahsil Customary Law, is equally inapplicable, as is the entry at page 55 of the *Riwaj-i-am* of that *tahsil*, cited by the Court of first instance. No other authority has been cited for the proposition that the appellant succeeds as heir to his wife.

At page 16 D of the Customary Law of the Moga *tahsil* it is recorded that all tribes except a few Sayads stated that daughters do not succeed to their fathers and in *Lehna v. Mussammat Thakri* ⁽¹⁾, it was held that, in a village community, where a daughter succeeds, either in preference to, or in default of, heirs male to property which, if the descent had been through a son, would be "ancestral," she simply acts as a conduit to pass on the property as ancestral to her sons and their descendants, and does not alter the character of the property simply because she happens to be a female.

In the case before us we are satisfied that the possession of the daughter was permissive, and that she did not acquire, by adverse possession, an estate inheritable by her husband.

No authority for decreeing possession to the husband for his life has been cited.

The appeal fails and is dismissed ; but, having regard to the position of the appellant, to the length of time during which his wife was allowed to remain in possession and to the fact that he did not set up a claim as *khanadamad*, which the respondents might have found considerable difficulty in meeting, we leave the parties to pay their own costs of all Courts.

Appeal dismissed.

(1) 32 F. R., 1895.

No. 17.

Before Mr. Justice Clark, Chief Judge.

BABU MAL,—(DEFENDANT),—APPELLANT,

Versus

SARDAR SINGH,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 24 of 1902.

Custom—Pre-emption—Plaintiff and defendant both claiming on ground of vicinage—Burden of proof.

In a suit for pre-emption of a house situate in the city of Delhi on the ground of a superior vicinage inasmuch as the pre-emptor's house and the house sold adjoined on one side and opened into the same lane, while the vendee's house adjoined the house sold in part on the back and opened into a different lane, the plaintiff in order to prove his claim produced two witnesses, who could give no instances in support of their statements, held, that the plaintiff had failed to establish a custom under which he had a superior right to claim pre-emption against the vendee.

Mehtab Roy v. Amir Chand ⁽¹⁾, *Chaudhri Khem Singh v. Mussammat Taj Bibi* ⁽²⁾, *Muhammad Azim Khan v. Nabir* ⁽³⁾, *Nawab Muhammad Mumtaz Ali Khan v. Khan Ali* ⁽⁴⁾, and *Mela Ram v. Prema* ⁽⁵⁾ cited. *Muhammad Salamatulla v. Jalal-ud-din* ⁽⁶⁾, not approved.

Further appeal from the decree of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 21st June 1901.

Madan Gopal, for appellant.

Ishwar Das and Lajpat Rai, for respondent.

The judgment of the learned Chief Judge was as follows:—

22nd Dec. 1902.

CLARK, C. J.—This is a pre-emption suit, the plaintiff's house adjoins the house sold on one side and opens into the same street, which is a *kucha sarbasta*, while the vendee, defendant's house adjoins it on the back in part, but defendant's house opens on to another street which is also a *kucha sarbasta*.

The question is whether plaintiff has a superior right of pre-emption to defendant.

For defendant the following authorities are quoted:—

Mehtab Roy v. Amir Chand ⁽¹⁾, *Chaudhri Khem Singh v. Mussammat Taj Bibi* ⁽²⁾, *Muhammad Azim Khan v. Nabir* ⁽³⁾, *Nawab Muhammad Mumtaz Ali v. Khan Ali* ⁽⁴⁾, and *Mela Ram v. Prema* ⁽⁵⁾.

They are cases similar to the present case in many respects and they clearly establish what is laid down by Chatterji, J.,

⁽¹⁾ 189 P. R., 1882.

⁽²⁾ 83 P. R., 1888.

⁽³⁾ 192 P. R., 1888.

⁽⁴⁾ 36 P. R., 1897.

⁽⁵⁾ 109 P. R., 1900.

⁽⁶⁾ 24 P. R., 1887.

in the last of these judgments that “ The right of pre-emption
“ is a right of very special kind, and as it has a tendency to
“ hamper free disposition of property, it requires to be clearly
“ and equivocally shown to exist before it is enforced. Considera-
“ tion of equity, convenience, privacy, exclusion of strangers
“ and the like doubtless underlie the custom of pre-emption,
“ but the law requires that it should be proved in a concrete
“ form, and it is not open to the Court to assume the existence
“ of any particular incident in the absence of proof, merely because
“ such incident can be supported on those considerations.”

For plaintiff *Muhammad Salamatulla v. Jalal-ud-din* ⁽¹⁾ is
relied upon, where Tremlett, J., says: “ We think, however, that
“ the same principle which prefers a neighbour to one who is not
“ one, would give a preference to a neighbour through whose gate-
“ way and over whose ground the house is approached to one who
“ is only a neighbour because the back of his house adjoins the
“ one sold, but whose approach is from a different side.”

In that case there was no doubt an extension of the ground
for pre-emption without proof, but I think that the judgments
quoted above show that such an extension has since been con-
sistently disallowed by this Court.

Nawab Muhammad Muntaz Ali v. Khan Ali ⁽²⁾ is, like this,
a Delhi case, and is quite similar to this case. There Stogdon,
J., laid down “ Vicinage confers the right in towns, but vicinage
“ of one kind may be superior to vicinage of another kind. A
“ plaintiff who comes into Court and asserts that his vicinage is
“ of a superior kind to that of defendant, vendee must prove his
“ claim.”

I hold, therefore, that it lay upon plaintiff to prove that his
particular form of vicinage gave him a superior right of pre-
emption to defendant.

The question then arises whether plaintiff has discharged
this *onus*.

The only proof is the evidence of two witnesses, who can
quote no instance, and two cases, one of which was disposed of by
compromise, and the other was decided on another point. The
District Judge has relied upon the evidence given in that case, but
the evidence given in that case is not admissible in this case I have
no hesitation in finding that plaintiff has not discharged the *onus*.

(¹) 24 P. R., 1887. (²) 36 P. R., 1897.

I therefore accept the appeal and dismiss the suit with costs throughout.

Appeal allowed.

No. 18.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Robertson.

C.,—(PETITIONER),—APPELLANT,

Versus

C.,—RESPONDENT,

AND

B.,—CO-RESPONDENT.

Civil Appeal No. 418 of 1902.

Divorce—Dismissal by Single Judge of application for dissolution of marriage—Appeal from such order of dismissal—Indian Divorce Act, 1869, Section 55—Punjab Courts Act, 1884, Section 9.

Held, that an appeal lies from all decrees and orders passed by a Single Bench in the exercise of its original jurisdiction in proceedings under the Indian Divorce Act, 1869, by virtue of Section 55 of that Act and Section 9 A of the Punjab Courts Act.

Appeal from the decree of the Hon'ble Mr. Justice Reid, Judge, Chief Court, dated 12th May 1902.

Grey, for appellant.

Oertel, for respondent.

Turner and Browne, for co-respondent.

The judgment of the Court was delivered by

16th Nov. 1902.

CLARK, C. J.—This is an appeal from the order of the Hon'ble Mr. Justice A. H. S. Reid, Judge of the Chief Court, Punjab, dismissing appellant's petition for dissolution of marriage and damages.

The first question that arises is whether an appeal lies from such order to a Bench of this Court.

The law on the subject is contained in Section 55 of the Indian Divorce Act, and Section 9 of the Punjab Courts Act, and the rules made by this Court under that section.

The parts of these sections that are applicable are Section 55: "All decrees and orders made by the Court in any suit or "proceeding under this Act shall be enforced and may be "appealed from in the like manner as decrees and orders of the "Court made in the exercise of its original civil jurisdiction are "enforced and may be appealed from under the laws, rules and "orders for the time being in force," Section 9 of the Punjab Courts Act runs—

“Except as otherwise provided by any enactment for the
“time being in force, an appeal from any decree or order” made
“by the Chief Court—

“(a) In exercise of its original jurisdiction in cases with-
“drawn from other Courts under Section 25 of the
“Code of Civil Procedure, or

“(b) in exercise of any other original jurisdiction of a civil
“nature to which the Chief Court may by rule extend
“this section,

“shall lie in the cases and in manner following.”

The rules made under Section 9 (b) by the Chief Court only
extend this section to—

The Indian Succession Act.

The Probate and Administration Act.

The Guardian and Wards Act.

They do not extend it to the Indian Divorce Act. For
appellant it is contended that the decree may under Section 55
be appealed against in like manner as the decree of the Court,
made in exercise of its original civil jurisdiction under the laws,
rules and orders in force, and that the appeal from a decree made
in the exercise of its original civil jurisdiction is provided for by
Section 9 (a) of the Punjab Courts Act.

For respondents it is contended that Section 9 (a) does not
apply to the original civil jurisdiction of the Court, but only to cases
withdrawn from the Court under Section 25, Civil Procedure Code,
and that the appeal should have been provided for by rule under
Section 9 (b), and this not having been done, that no appeal lies.

We think that appellant's contention must prevail. This
Court has no original civil jurisdiction in ordinary civil cases
except in cases withdrawn from other Courts, and Section 9 (a)
therefore provides generally for an appeal from a decree passed
in exercise of its original civil jurisdiction and Section 55 gives
in decree under the Divorce Act, the appeal provided by Section
9 (a) of the Courts Act.

We have referred to the unpublished judgment of Mr. Justice
Rivaz, in Civil Appeal No. 888 of 1894, in which he held that no
appeal lay from a decree *nisi* by a single Judge. This was the
judgment of a single Judge and the question is not discussed at any
length, but after giving it the consideration to which a decision by
that Judge is entitled we are unable to agree with that decision.

We hold that the appeal lies and proceed to hear the appeal
on the merits.

No. 19.

Before Mr. Justice Reid and Mr. Justice Robertson.

HAYAT MUHAMMAD AND ANOTHER,—
(DEFENDANTS),—APPELLANTS,

Versus

ALA BAKHSH AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 1504 of 1899.

Custom—Inheritance—Waraich Jats of Gujrat tahsil—Gift of ancestral property to daughter's son—Failure of direct heirs of donee—Right of heirs of donor to succeed to property gifted in preference to those of donee—Suit by a reversioner for possession of immovable property—Defendant in possession under will made by testator without title—Reversioner not barred by reason of his having failed to contest such will within three years.

In a suit the parties to which were Waraich Jats of the village of Kaka in the Gujrat District, found, that when a gift of ancestral property has been made to a daughter's son in virtue of that relationship and he dies without issue, the property reverts on the death of the original donee to the heirs of the donor and not to those of the donee.

Held, that a suit by a reversioner to recover possession of immovable property in the hands of a defendant under an alleged will cannot (where the testator had no power to dispose of the property by will) be barred by reason of his (the reversioner) having failed to contest the validity of such will within a period of three years.

Sita Ram v. Raja Ram ⁽¹⁾, *Muhammad v. Mussammat Umar Bibi* ⁽²⁾, *Ghulam Muhammad v. Muhammad Bakhsh* ⁽³⁾, *Fauja v. Kasu* ⁽⁴⁾, *Dasaunda Singh v. Mussammat Partab Kaur* ⁽⁵⁾, *Gogan v. Taloka* ⁽⁶⁾, *Ditta v. Muhammad Bakhsh* ⁽⁷⁾, *Mangat v. Wazir Singh* ⁽⁸⁾, *Atra v. Umra* ⁽⁹⁾, *Aman Ali v. Mussammat Amina Begam* ⁽¹⁰⁾, and *Fatteh Ali v. Abdulla* ⁽¹¹⁾ referred to.

Further appeal from the decree of Rai Bahadur Lal Buta Mal, Additional Divisional Judge, Jhelum Division, dated 30th November 1899.

Beechey, for appellants.

Minwala, for respondents.

The facts of the case are fully stated in the judgment of the Court delivered by

1st Dec. 1902.

ROBERTSON, J.—The facts in this case are clear, and are practically undisputed.

⁽¹⁾ 12 P. R., 1892, F. B.

⁽²⁾ 129 P. R., 1893.

⁽³⁾ 4 P. R., 1891, F. B.

⁽⁴⁾ 122 P. R., 1879.

⁽⁵⁾ 53 P. R., 1882.

⁽⁶⁾ 163 P. R., 1882.

⁽⁷⁾ 146 P. R., 1884.

⁽⁸⁾ 82 P. R., 1885.

⁽⁹⁾ 1 P. R., 1886.

⁽¹⁰⁾ 46 P. R., 1890.

⁽¹¹⁾ 112 P. R., 1900.

In March 1878 one Fateh Din, a Waraich Jat of the Gujrat District, gifted the land in question to one Khan Muhammad, who was a son of Fateh Din's daughter.

Subsequently Fateh Din himself assisted the collaterals in a suit in which they sought to revoke or cancel the gift, but it was upheld. In this suit plaintiffs or their ancestors were joined, but the suit was dismissed and the gift maintained, it being found that Fateh Din was competent to gift the land to his daughter's son and had done so. We consider it clearly established that the land in question was the ancestral land of Fateh Din. Khan Muhammad obtained possession of the land under the gift, and on his death in 1891, his own father, Gahna, took possession of the land. It is alleged that Khan Muhammad devised the land by will to Gahna, and a will purporting to be executed by Khan Muhammad and the execution of which was held by the first Court to have been proved, is on the record. Gahna died some three or four years before this suit was filed, and in 1899, the present plaintiffs, collaterals of Fateh Din, sued the sons of Gahna for possession of the land in question, on the allegation that, on Khan Muhammad's death without heirs, the land should revert to the collaterals of the original donor and not to the natural relatives of the donee.

The first Court found in favour of the defendants, holding that, though the land was clearly originally the ancestral land of Fateh Din, it became, by the gift, the self-acquired property of Khan Muhammad, who could dispose of it as he pleased, and who was found, as a fact, to have devised it by will to Gahna, who was his heir, even in the absence of a will, in preference to plaintiffs.

The lower Appellate Court, on appeal, reversed the judgment of the first Court and decreed the claim, holding that, on the death of Khan Muhammad to whom Fateh Din had gifted the land in virtue of his being Fateh Din's daughter's son, without issue, the land reverted to the heirs of the original donor. The learned Divisional Judge mainly relied, in support of the view taken by him, on the rulings of this Court recorded in *Sita Ram and others v. Raja Ram* ⁽¹⁾ and in *Muhammad v. Mussamat Umar Bibi* ⁽²⁾.

From this decision the defendants, the brothers of Khan Muhammad, have filed an appeal before this Court. It is somewhat curious that no case exactly on all fours with the one before

(1) 12 P. R., 1892, F. B.

(2) 129 P. R., 1893.

us has yet been dealt with by a Division Bench of this Court and published in the *Punjab Record*.

The learned counsel for the appellants, in dealing with the authorities relied on by the lower Appellate Court, urged that, as regards *Sita Ram v. Raja Ram* ⁽¹⁾ the case before the Court was one of adoption and the finding, which is really of authority, is that, in case of an adopted son dying without heirs, the property inherited from his adoptive father reverts to the heirs of the adoptive father, and not to the natural heirs of the adopted son. It is urged that this does not cover the case of a gift with possession to a daughter's son, which, it is urged in the present case, conferred full and absolute ownership. There can, however, be no doubt that the learned Judges of the Full Bench in the judgment printed in *Sita Ram v. Raja Ram* ⁽¹⁾ treated the question of alienation by gift or alienation by adoption, as standing on the same footing. On page 62 of the volume of the *Punjab Record* for 1892, the learned Judge remarks :—

“ I think there can be no doubt that the principle laid down in “ *Gholam Muhammad v. Muhammad Bakhsh* ⁽²⁾ is the true principle of succession, and under it, the persons called in the case before us, the collaterals of the donor or adopter, have an undoubted right to succeed in preference to the collaterals of the donee or adopted son, who have really no rights of succession at all.” It is urged upon us that the judgment in *Sita Ram v. Raja Ram* ⁽¹⁾, is more a disquisition upon the theory of agnatic succession than a decision upon points before the Court, and that the views expressed do not now command the same acquiescence as they once did.

No doubt it is true that the learned and exhaustive judgment reported in *Sita Ram v. Raja Ram* ⁽¹⁾, does discuss the whole subject in a scientific manner, and contains some views which may be said to be *obiter dicta*. But although it may be said with considerable truth that, as regards one particular apparent variation from the pure theory of agnatic succession, the views expressed in some of the judgments of this Court from 1887 onwards have not been altogether supported by subsequent enquiry and the opinion of those best informed, we are unable to find any subsequent judgment of this Court which in any way traverses the general view expressed in *Sita Ram v. Raja Ram* ⁽¹⁾, as to the main principles which usually govern succession to ancestral land in this province, and we see no reason ourselves to doubt, as

(1) 12 P. R., 1892. (2) 4 P. R., 1891, F. B.

regards the point dealt with in that judgment, that they were quite correct. No doubt that case was one of customary adoption, in this it is one of gift, and we have to consider whether the principle laid down in *Sita Ram v. Raja Ram* ⁽¹⁾ covers this case also.

It is no doubt correct that there is a long array of authorities prior to the publication of *Sita Ram v. Raja Ram* ⁽¹⁾ which take the view urged on us by Mr. Beechey. (*Fauja v. Kasu* ⁽²⁾), *Dasaunda Singh v. Mussammat Partab Kaur* ⁽³⁾, *Gogan v. Taloka* ⁽⁴⁾, *Ditta v. Muhammad Bakhsh* ⁽⁵⁾, *Mangat v. Wazir Singh* ⁽⁶⁾, *Atra v. Umra* ⁽⁷⁾, and *Aman Ali v. Mussammat Amina Begam* ⁽⁸⁾). Nearly all of these are discussed in *Sita Ram v. Raja Ram* ⁽¹⁾, except perhaps *Aman Ali v. Mussammat Amina Begam* ⁽⁸⁾, and their authority is therefore much minimised, if not entirely set aside, by the later Full Bench ruling.

Turning to the facts in this case, we find that in the deed of gift by Fateh Din to Khan Muhammad, dated 17th March 1898, the gift is said to be made to Khan Muhammad as Fateh Din's daughter's son, in the absence of male issue.

In 1889 a suit was brought by Maula Dad and Kadar Dad against Fateh Din and Khan Muhammad, traversing Fateh Din's right to make the gift in their presence. Fateh Din sided with the collaterals, but the gift was upheld. This may be held to have established Fateh Din's right to gift ancestral land to his daughter's son, but it in no way decides who is entitled to succeed when that daughter's son dies without direct male heirs, as has now occurred.

We have heard counsel for the appellants fully, and we see no reason to hold that Khan Muhammad's own natural relations were entitled to succeed to the land gifted to him by Fateh Din, specifically as his, Fateh Din's daughter's son. The matter is discussed in a somewhat, though not precisely, similar case, by Mr. Justice Rattigan in his judgment in *Fatteh Ali and others v. Abdullah and others* ⁽⁹⁾. There, however, the gift had been to one agnate, a grandnephew, not a daughter's son. We think it clear that the property was the ancestral property of Fateh Din, that it was passed on to Khan Muhammad, as daughter's son in virtue of a customary variation, permitted more or

(1) 12 P. R., 1892.

(2) 122 P. R., 1879.

(3) 53 P. R., 1882.

(4) 163 P. R., 1882.

(5) 146 P. R., 1884.

(6) 84 P. R., 1885.

(7) 1 P. R., 1886.

(8) 46 P. R., 1890.

(9) 112 P. R., 1900.

less commonly throughout the province, from the principle of pure agnatic succession in favour of the daughter's son who is supposed to take the place of a true son, and that is passed on to Khan Muhammad as ancestral property of Fateh Din's family. On Khan Muhammad's death without heirs, we cannot see any principle of custom, law or justice, under which the property should go to Khan Muhammad's own relation. The actual case before us is not dealt with in the volume of Customary Law prepared at last Settlement, but the principles to govern the case seem to be indicated pretty clearly in the answer to question 13 at page iv.

The question is, "On the death of a daughter who has succeeded to ancestral property does the property pass to collaterals of the daughter's father, or collaterals of the daughter's husband?" All Muhammadans are recorded as replying, *inter alia*, that, "if a daughter to whom property has been transferred by gift dies without male issue, her husband succeeds for life only, and on his death, it passes to the collaterals of his wife." We think the same principle applies when the gift is made direct to the daughter's son, and he dies childless.

We think that the gift was clearly intended to favour Fateh Din's daughter, to place her issue, in default of direct male heirs of Fateh Din's body, in the position which a son of Fateh Din would have occupied, *qua* the ancestral property of Fateh Din, to continue Fateh Din's family by a kind of legal fiction. But we cannot see that because the gift was held to be legal and valid to Khan Muhammad as a daughter's son, that therefore on his death without issue, the land must pass to persons in whom Fateh Din had no sort of interest, and presumably no desire whatever to benefit. We do not wish to lay down any general principles not necessary to the decision of this case, or to stretch any theory of custom beyond its legitimate limits, but as regards the case before us, we think that it has been rightly held that among the Waraich Jats of the village of Kaka in the Gujrat District, when a gift has been made to a daughter's son in virtue of that relationship, and that daughter's son dies without issue, the land, if the ancestral land of the donor at the time of the gift, reverts on the death of the original donee to the heirs of the donor and not to those of the donee.

One word only need be added regarding the alleged will. It is urged that on the death of Khan Muhammad Gahna took the land in question under a will executed by Khan Muhammad,

and that no suit having been brought to contest the will within three years, the present suit is out of time. As we have held that Khan Muhammad had no power to dispose of the property by will, it was not necessary to get the will set aside, and the suit is therefore within time. The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

No. 20.

Before Mr. Justice Reid and Mr. Justice Robertson.

NARAIN SINGH,—PLAINTIFF.

Versus

HAYAT,—DEFENDANT.

Civil Reference No. 15 of 1902.

} REFERENCE SIDE.

Mortgage—Possession—Suit for possession under the terms of a registered mortgage-deed, wherein in addition to that condition other clauses intended to operate by way of conditional sale existed—Application of Section 9 (3) of Punjab Alienation of Land Act to such cases—Duty of Appellate Court—Procedure—Punjab Alienation of Land Act, 1900.

The plaintiff sued for possession as mortgagee of certain land by a registered deed which contained a condition that plaintiff should take possession as mortgagee in the event of failure to pay certain instalments, but there were two other clauses in the deed which were intended to operate by way of conditional sale. The first Court gave a decree for possession without making any reference to the Deputy Commissioner under Section 9 (2) and (3) of the Punjab Alienation of Land Act, 1900. In appeal before the Divisional Judge it was urged that the deed should have been referred to the Deputy Commissioner and that that course should now be taken by the Appellate Court. The Divisional Judge referred the following points for the decision of the Chief Court :—

- (1) Does Section 9 (3) of the Land Alienation Act apply to a case in which the plaintiff sues on a mortgage to which Section 9 (2) applies but does not sue to enforce the condition intended to operate by way of conditional sale ?
- (2) Whether when the lower Court has wrongly neglected to refer the case to the Deputy Commissioner, the Appellate Court should pass over the irregularity ?
- (3) Assuming that the Appellate Court should amend the irregularity of the lower Court, what form should that amendment take ?

Held—

- (1) that Section 9 (3) apply, but in cases in which the plaintiff not only did not sue on the clause regarding conditional sale, but surrenders that condition altogether and agrees of his own motion to have it struck out, the mortgage would cease

to be one including such a clause and the reference to the Deputy Commissioner would be no longer necessary, as there would be no mortgage before the Court coming within the purview of Section 9 (2)

- (2) that the provisions of Section 9 (2), (3) of the Punjab Alienation of Land Act are imperative, and if the first Court passed a wrong order it is clearly the duty of an Appellate Court to set it right ;
- (3) that according to the provisions of Section 582, Civil Procedure Code, the Appellate Court should proceed in the same manner as a Court of first instance would proceed to decide the preliminary points noted therein, and thereafter if a reference to the Deputy Commissioner is still necessary under Section 9, it should be made either direct or through the lower Court, and in those cases where the exercise of his powers under the Alienation of Land Act by the Deputy Commissioner would not dispose of the case, the Civil Court making the reference should dispose of it after the Deputy Commissioner has discharged his duties in connection therewith.

Case referred by W. Chevis, Esquire, Divisional Judge, Rawalpindi Division, on 6th August 1902.

Gurcharan Singh, for plaintiff.

Ishwar Das, for defendant.

The judgment of the Court was delivered by

22nd Nov. 1902.

ROBERTSON, J.—This case comes before us on a reference from the learned Divisional Judge of Rawalpindi.

The facts are as follows :—

The plaintiff sued on a mortgage deed, dated 27th June 1897, for possession as mortgagee on a deed which provided, *inter alia*, that if certain instalments were not paid the mortgagee could take possession of the mortgaged land. The deed went on to recite that if the whole amount of the mortgage-money was not paid within two years after possession had been taken the mortgage would become a sale, or that if any instalment was not paid, then after two years from that date the mortgage was to become a sale.

The suit was to enforce the right of possession only, not of conditional sale, and the first Court gave a decree for possession without making any reference to the Deputy Commissioner under Section 9 (2) and (3) of the Land Alienation Act.

In appeal before the learned Divisional Judge it was urged that the deed should have been referred to the Deputy Commissioner for action under Section 9 (2) of the Punjab Land Aliena-

tion Act and that that course should be taken by the Appellate Court. The plaintiff urged that no such reference was necessary as no attempt was being made to enforce the clause relating to conditional sale, the claim being for possession only, and further urged that defendant had waived the right to reference to the Deputy Commissioner.

The learned Divisional Judge has found that the mortgagor is a member of an agricultural tribe, the mortgagee being a Khatri.

The learned Divisional Judge has referred the case on the following points:—

(1) Does Section 9 (3) of the Land Alienation Act apply to a case in which the plaintiff sues on a mortgage to which Section 9 (2) applies but does not sue to enforce the condition intended to operate by way of conditional sale?

To this we would reply that Section 9 (3) does apply. But in cases in which the plaintiff not only does not sue on the clause regarding conditional sale, but surrenders that condition altogether, and agrees of his own motion to have it struck out, in our opinion the mortgage would cease to be one including such a clause and the reference to the Deputy Commissioner would be no longer necessary as there would be no mortgage before the Court coming within the purview of Section 9 (2). Under that section and sub-section the mortgagee would have the option of maintaining the mortgage in this case, *minus* the clause regarding conditional sale. The Deputy Commissioner could only put him in the position in which he has already put himself, and a reference would be unnecessary and futile. The counsel for the plaintiff has definitely before us abandoned all the clauses and conditions relating to conditional sale and agrees to their being considered *null* and void. The case can therefore proceed now without reference to the Deputy Commissioner.

(2) The next question referred is "whether when the lower Court has wrongly neglected to refer the case to the Deputy Commissioner the Appellate Court should pass over the irregularity."

To this we would reply that the provisions of Section 9 (2) (3) of the Land Alienation Act are imperative, and if the first Court has passed a wrong order it is clearly the duty of the Appellate Court to set it right. The power and duties of an Appellate Court in this connection are of course precisely the same as those of the first Court; there is nothing whatever in

clause 9 of the Land Alienation Act to take proceedings taken in accordance with that section out of the purview of Section 582, Civil Procedure Code.

The third question referred, which has been in great part disposed of by the remarks recorded above, is—

(3) Assuming that the Appellate Court should amend the irregularity of the lower Court what form should that amendment take ?

With regard to this we would call the attention of the lower Appellate Court to Section 582, Civil Procedure Code, and to the Circular Memo. of this Court No. 3—1118 G. of 1902 (printed in the *Punjab Record*, Executive for April, May, June, p. 5). The Appellate Court should proceed in the same manner as a Court of first instance would proceed to decide the preliminary points noted therein. Having done so, if a reference to the Deputy Commissioner is still necessary under Section 9, the reference should be made either direct or through the lower Court, and if the case is one, like the present, in which the exercise of his power under the Land Alienation Act by the Deputy Commissioner will not dispose of the case, the Deputy Commissioner should be requested to return the record after discharging his duties in connection therewith, to the Civil Court making the reference, for the further disposal of the case.

As the plaintiff did not clearly renounce the clauses in the mortgage-deed in the first Court, we direct that he shall pay the costs of this reference.

The case will now be returned to the lower Appellate Court for disposal according to law.

No. 21.

Before Mr. Justice Reid.

RAM CHAND,—(PLAINTIFF),—APPELLANT,

Versus

SANDAL KHAN,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 318 of 1902.

Mortgage—Conditional sale—Foreclosure—Regulation XVII of 1806, Section 7—Validity of notice of foreclosure.

It is essential to the validity of a notice of foreclosure under Section 8 of Regulation XVII of 1806 that it shall inform the mortgagor that he must within the year redeem the property in the manner provided for by Section 7 of the Regulation. In a case where the notice issued was headed

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"application for issue of a notice of foreclosure under Sections 7 and 8 of "Regulation XVII of 1806," and notified "that if you shall not redeem the "said property in the manner provided for in the foregoing section of the "said Regulation," held, that the omission to specify Section 7 was a fatal defect to the validity of the notice, as there was no notice which of the two sections mentioned in the heading was referred to.

Mul Raj v. Harsa Singh ⁽¹⁾, *Wasawa Singh v. Rara* ⁽²⁾, and *Achhar Maj v. Hukman* ⁽³⁾ cited. *Wali Muhammad v. Ramji Das* ⁽⁴⁾, *Mussammat Sardari v. Chiranjil Lal* ⁽⁵⁾, and *Jivan Ram v. Amir Beg* ⁽⁶⁾ referred to.

Further appeal from the decree of Major G. O. Beadon, Divisional Judge, Jullundur Division, dated 3rd February 1902.

Ishwar Das, for appellant.

The judgment of the learned Judge was as follows:—

REID, J.—The facts are stated in the judgment of the lower Appellate Court, which has found that the notice of foreclosure under Regulation XVII of 1806 was defective. That Court has also found that a lease relied on by the appellant was inadmissible in evidence, being unregistered, and, even if admissible, was not assented to by the respondent with full knowledge of its terms. 9th Dec. 1902.

The respondent now denies the execution of this lease and, inasmuch as the appellant's object in tendering it is to prove the sale set up by him, I concur in the finding that, being compulsorily registerable under Section 17 of the Registration Act, it is inadmissible under Section 49 of the Act. I am unable to hold that the passages of the lease, which dealt with the change of possession, were mere recitals of a transfer already effected unless it be held that the foreclosure proceedings were valid. The pleader for the appellant cites *Wali Muhammad v. Ramji Das* ⁽⁴⁾, *Mussammat Sardari v. Chiranjil Lal* ⁽⁵⁾, and *Jivan Ram v. Amir Beg* ⁽⁶⁾, for the contention that defects in form do not invalidate the notice of foreclosure. In those cases it was held that a misdescription of the Regulation, or the substitution of the words "pay off the mortgage debt" for "redeem the property mortgaged" in the notice under Section 8 of the Regulation did not render the notice void.

In *Mul Raj v. Harsa Singh* ⁽¹⁾ it was held that it is essential to the validity of the notice that it should under Section 8 of the Regulation inform the mortgagor that he must,

⁽¹⁾ 123 P. R., 1894. ⁽⁴⁾ 5 P. R., 1901.

⁽²⁾ 24 P. R., 1895. ⁽⁵⁾ 28 P. R., 1901.

⁽³⁾ 28 P. R., 1897. ⁽⁶⁾ 38 P. R., 1901.

within the year, redeem the property mortgaged in the manner provided by Section 7, and that a mere notice that the mortgagor must redeem the property mortgaged within one year does not comply with the requirements of the Regulation.

This ruling was followed in *Wasawa Singh v. Rura* ⁽¹⁾, in which it was held that the omission to comply with provisions of the Regulation in this respect is a fatal defect which vitiates the whole notice; and in *Achhar Mul v. Hukman* ⁽²⁾, where it was contended that although the notice did not contain the words "in the manner provided for by Section 7 of Regulation XVII of 1806," the meaning of the notice clearly was that the mortgagor must redeem the property according to law.

The notice in suit is headed "application for issue of a notice of foreclosure under Sections 7 and 8 of Regulation XVII of 1806, in respect of 50 *kanals* and 9 *marlas* of land, and 15 *kanals* and 11 *marlas* of land, in all 66 *kanals* of land (here follow the numbers of the fields) mortgaged under mortgage deeds dated the 21st December 1889 and 22nd March 1891 for Rs. 508 principal and Rs. 321-4-6 profits, or in all for Rs. 829-4-6." The body of the notice contained the words, "It is notified to you by this notice that if you shall not pay up the entire mortgage-money, &c., noted in the application and thus redeem the said 66 *kanals* of land in the manner provided for in the foregoing section of the said Regulation within one year from the date of the notification, the mortgage in respect of 66 *kanals* of land will be finally foreclosed in favour of the mortgagee."

The word "section" in the above extract being singular, the respondent had not notice which of the two sections mentioned in the heading was referred to.

On the authorities above cited the omission to specify Section 7 is fatal. The only admission relied on is contained in the lease which is inadmissible.

The appeal fails and is dismissed. No pleader's fee is allowed, the respondent being unrepresented.

Appeal dismissed.

(1) 24 P. R., 1895. (2) 28 P. R., 1897.

No. 22.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Robertson.

C.,—APPELLANT

Versus

C.,—RESPONDENT,

AND

B.,—CO-RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 418 of 1902.

Divorce—Appeal against the order of a Single Bench dismissing an application for dissolution of marriage—Limitation for such appeal—Limitation Act, 1877, Schedule II, Article 151—Necessity for copy of decree appealed against accompanying a memorandum of appeal—Civil Procedure Code, 1882, Section 541.

A petition filed by the appellant for dissolution of marriage having been dismissed by a Single Bench of the Chief Court in the exercise of its original jurisdiction, on the 12th May 1902, an appeal, without either a copy of the judgment or decree, was filed on the 7th June 1902.

The co-respondent objected that the appeal, was barred by limitation : 1st on account of the appeal having been filed beyond the time allowed by law, and 2nd on account of the want of either a copy of the decree or judgment having been filed with the grounds of appeal as required by Section 541 of the Civil Procedure Code. The appellant's counsel urged that, as neither he nor his client were aware of the date on which the judgment was to be delivered or were aware of it until just before the appeal was filed, asked the Court to excuse the delay in filing of the appeal under the provisions of Sections 5 and 5 (a) of the Limitation Act, and that he might also be allowed to file a copy of the decree and judgment.

Held, (i) that as under Section 16 of the Punjab Courts Act it was unnecessary for a Judge of the Chief Court to pronounce his judgment in open court or on a date appointed and announced to the parties, the appellant was not entitled to claim consideration on that account as a matter of right, and that as the appeal was filed after the period allowed by Article 151 of the Limitation Act, it was barred by time ;

(ii) that as an Appellate Court could not dispense with the presentation of a copy of the decree appealed against the appeal filed by the appellant was not a good appeal in law ;

(iii) that when an appeal is filed after it is time barred and the appellant desires to take the benefit of the provisions of Sections 5 and 5 (a) of the Limitation Act, the cause of the delay should be stated at the time the appeal is filed.

*Appeal from the decree of the Hon'ble Mr. Justice Reid, Judge,
Chief Court, dated 12th May 1902.*

Grey, for appellant.

Oertel, for respondent.

Turner and Browne, for co-respondent.

The judgment of the Court was delivered by—

13th Dec. 1902.

ROBERTSON, J.—Two preliminary points are raised by Mr. Turner, counsel for the respondents, in this appeal which it is necessary to deal with.

The first is that under Article 151 of the second schedule of the Limitation Act this appeal is barred by time, and the second is that no copy of decree or judgment was filed with the appeal, so that no appeal preferred according to law is before this Bench and the appeal is now barred by a long period of time.

As regards the first point, the objection is clearly correct. The judgment of the learned Judge bears the date of 12th May 1902 and the decree bears the same date, under the rules of this Court, although possibly drawn up a few days later, and the appeal was not presented until the 7th June 1902, no copy of decree or judgment accompanied the petition of appeal, but counsel for the appellant states that he applied for a copy of the judgment on 21st May, having heard from his client before doing so by telegram, and that he obtained a copy on the 23rd May, allowing two days for obtaining a copy of the judgment therefor, under Article 151, Limitation Act, which allows twenty days as the period within which this appeal should have been filed, the period of limitation expired on the 3rd June and this appeal was filed on the 7th June. It is therefore clearly time-barred.

It is urged, however, that the time should be extended under Section 5 and Section 5 (a) of the Limitation Act.

It is urged that the judgment of our learned brother Reid was written and signed on the 12th May, but that neither appellant in person, nor his counsel, became aware of this judgment for several subsequent days, as no notice of the date when judgment was to be pronounced was given, and Mr. Grey states that to the best of his belief he did not see it till 21st May having received a telegram on or about 20th May apprizing him of its issue.

Now under the Punjab Courts Act, Section 16, it is not necessary for Judges of this Court to pronounce judgment in open Court on dates fixed beforehand and duly announced to parties

or counsel, and under the rules regulating the procedure of this Court in the exercise of its original civil jurisdiction it is open to the presiding Judge either to write his judgment in English or to deliver it orally—[Rule V under Section 16 (3)].—If delivered, *i.e.*, delivered orally, it must be delivered in open Court—[Rule VII under Section 16 (3)].—It is not contended by the learned counsel for the appellant that he was in any way misled as to the practice of the Court, he was well aware that the practice was for Judges to send written judgments into the Deputy Registrar's office where they can be inspected, or whence they can be at once procured for perusal in the bar room. It was, however, contended that the practice in vogue may very well lead to delay in knowledge of the issue of a judgment. There was a distinct conflict between the counsel engaged for the appellant and those engaged for the respondents as to the practice of giving notice from the Deputy Registrar's office to counsel on the receipt of a judgment. We understood counsel for the respondent to say that information is given and the judgment shown to counsel on receipt, should they be present in the bar room. Mr. Grey, however, stated that this is never done, and it is only when application is made either in person to the Deputy Registrar, or by slip, that judgments are seen by counsel. The point is therefore left in doubt. It is, however, quite clear that counsel for the appellant was aware of the judgment on the 20th May, that he applied for a copy on the 21st and obtained it on the 23rd May. He had therefore at least eleven clear days up to 3rd June within which to put in his appeal, and he was, on his own statement, already in communication with his client who wired to him on the 20th May. We should therefore have expected some reason to be stated when the appeal was filed of the causes which led to the delay and to the presentation of the petition of appeal after it had become time-barred.

But even if we were prepared to waive the delay, and to extend the time for the presentation of the appeal in the interest of the appellant, under Section 5 of the Limitation Act, if the matter stood here, there is a further question to be considered in the omission to file any copy of the judgment or the decree. The failure to file a copy of the judgment under Section 541 of the Civil Procedure Code might be got over, but the failure to file a copy of the decree appears to be fatal. This has been held to be a fatal defect in *Golab Devi and another v. Shankar Lal* (1), by a

(1) *All. Weekly Notes* (1892), p. 47.

Division Bench of the Allahabad High Court, and the same view was taken in *Chimela Kaur and others v. Amir Khan* ⁽¹⁾, by another Judge of the same Court, it being held that a copy of a decree is a necessary accompaniment to a valid appeal. The copy of the judgment which should be filed under Section 541, Civil Procedure Code, may be dispensed with, but it is not in the power of the Appellate Court to dispense with the copy of the decree. It is remarked with approval by Edge, C. J., in *Bhawani Prasad v. Kalu and others* ⁽²⁾, that the word “ ‘shall’ of Section “ 541 of the Code of Civil Procedure has been held by all the “ judges of this Court to be so imperative as to preclude a Court “ from accepting a memorandum of appeal which is not accom- “ panied by a copy of the decree appealed against and from treat- “ ing the presentation of a memorandum of appeal which is not “ accompanied by a copy of the decree as a valid presentation of “ an appeal.”

Mr. Grey asks, however, to be allowed now to file a copy of the decree and to have the period of appeal extended from twenty days to something over six months under Section 5 in order to bring the appellant's appeal within time.

To take such a course would simply be to cancel Section 541, Civil Procedure Code. We can see no reason why we should go out of our way to make of none effect a clear provision of the law by putting Section 5 of the Limitation Act to a use which is clearly not intended and which is contrary to the entire spirit of judicial administration.

We therefore hold that whatever order we might have passed had the appeal presented on 7th June been otherwise in complete order the further defects not remedied to date which precludes us from accepting the petition presented on 7th June as a validly presented appeal, compels us to reject the petition. If a copy of the decree were to be annexed now the appeal would be more than five months out of time. The application of the appellant therefore is rejected.

Only one other point requires notice. Mr. Grey suggested that there was no “decree” passed in this case but only an order. We are not certain how far this was a serious contention, but it is clearly quite untenable in face, *inter alia*, of Sections 45 and 55 of Act IV of 1869 and Section 2 of the Civil Procedure Code.

The petition is dismissed with costs.

Appeal dismissed.

⁽¹⁾ I. L. R., XVI All., p. 77.

⁽²⁾ I. L. R., XVII All., p. 553.

No. 23.

Before Mr. Justice Anderson and Mr. Justice Robertson.

MUL CHAND,—PLAINTIFF,

Versus

PIYARE LAL AND ANOTHER,—DEFENDANTS.

Civil Reference No. 14 of 1902.

Assignment of debt—Right of assignee to sue—Suit for dissolution of partnership—Sale of outstandings before the business was dissolved—Validity of such sale—Civil Procedure Code, 1882, Section 215.

Held, that where a plaintiff sues for the recovery of a debt as an assignee, he is bound to prove that he was a *bond fide* assignee of the debt and capable of giving a valid discharge especially where the defence questions the validity of the alleged assignment.

Under Section 215, Civil Procedure Code, a Court trying a suit for dissolution of partnership has no power to sell outstandings or to take any of the proceedings indicated in that section until it has passed an order dissolving the partnership, therefore where previous to the passing of the preliminary decree dissolving the partnership the Court sold a large portion of the outstandings and then dismissed the suit for want of prosecution, *held*, that the sale was invalid and *ultra vires*.

Thirukumares in Chetti v. Subbaraya Chetti ⁽¹⁾, referred to.

Case referred by S. Clifford, Esquire, Divisional Judge, Delhi Division, on 28th June 1902.

Shadi Lal, for plaintiff.

Ram Bhaj Datta, for defendants.

The judgment of the Court was delivered by—

ROBERTSON, J.—This case has come before us as a reference from the learned Divisional Judge of Delhi, under Section 617, Civil Procedure Code. 13th Feby. 1903.

The plaintiffs were suing as assignees of a debt due from the defendants to certain other persons. The defendants took the plea that the plaintiff was not in fact or in law assignee of the debt in question and therefore could not sue. It would appear quite clear that the defendants are fully entitled to take this plea and that the plaintiff could not succeed, unless and until they had proved, after the points had been put in issue and duly tried, that he was *bond fide* assignee of the debt and capable of giving a valid discharge. In order to have this clearly and satisfactorily tried and decided the obvious course would have been for the plaintiff to join the original creditors as defendants, or if he

⁽¹⁾ *I. L. R.*, XX Madras, p. 313.

} REFERENCE SIDE.

neglected to do so either of the lower Courts could, and should, have directed this to be done. We think that there can be no question that defendants were entitled to put the plaintiff to the proof that he was a *bonâ fide* assignee and to question the validity of the alleged sale.

As to the validity of the sale itself, as the case is now before us, we think it will be most convenient to dispose of it finally here.

After hearing full arguments and considering the facts disclosed by the record, we are of opinion that the decision of the Divisional Judge (Mr. R. L. Harris), dated 23rd December 1899, took the correct view.

It appears that of three partners to a firm, one Ragu Nath sued for a dissolution of partnership. Various steps were taken and finally a sale of certain outstanding debts to the firm was ordered by the Court, Ragu Nath, plaintiff, and Damodar Das, one of the defendants' partners apparently, consenting. The third partner, Gordhan Das, appears to have given no assent to the sale which was ordered on 26th October 1899. The conduct of Damodar Das over this sale does not appear to have been very straightforward, and after one adjournment for lack of bids the outstandings of nominal value of over Rs. 4,000 were sold to Mool Chand, Damodar Das' brother, for Rs. 100 only, on 16th November 1899. On 22nd November 1899 an order was passed sanctioning the sale, and at the same time dismissing the suit for dissolution of partnership in default. Ragu Nath subsequently applied to have the *ex-parte* order dismissing the suit for dissolution set aside, and also taking objections to the sale, but the application was dismissed, after consideration of that part of the order only which referred to the setting aside of the *ex-parte* order dismissing the suit, but without any consideration of the objections to the sale.

Now, it appears to us quite clear that the sale was invalid and *ultra vires*. We have the curious result at present that the suit for dissolution has been dismissed, the partnership still subsists, but a large portion of the outstandings have been sold to a brother of one of the partners for a very small sum.

Now it appears to us that under Section 215, Civil Procedure Code, the Court trying a suit for dissolution of partnership has no power to sell outstandings, or to take any of the proceedings indicated in Section 215, Civil Procedure Code, until it has passed an order under Section 215, amounting, as it has been sometimes

called, to a preliminary decree in the form given in Schedule IV, No. 132 to the Civil Procedure Code.

The proper course for the Courts to have followed was to issue an order, a preliminary decree under Section 215, Civil Procedure Code, in form 132, Schedule IV, and then to take the necessary further proceedings. This is the view taken in *Thirukumaresan Chetti v. Subbarya Chetti* ⁽¹⁾, with which we concur. Until this has been done a Court has no power to order the sale of outstanding debts due to a subsisting firm, merely because a suit for dissolution of partnership has been instituted. We do not know of any provision of law which invests the court with such a power, and we agree with Mr. Harris that any sale so ordered would *ipso facto* fall to the ground if no decree for dissolution were passed and the suit itself were dismissed. We go further than this, and are unable to see how such a sale could legally be ordered or carried out until an order in accordance with Section 215, Schedule IV, No. 132, deciding that there was to be a dissolution from a certain date, had been passed.

It is urged upon us, however, that the sale must be held to be binding, because it was made by consent of the parties, and that the Court was acting in the matter as the agent of the parties. We do not say that such an argument might not prevail in some cases, or that in certain circumstances when a sale had been made before the issue of the necessary order under Section 215 and No. 132 of Schedule IV that the vendors might not be estopped from contesting it by their own action. But these considerations do not arise here because it is quite clear that one of the partners never gave any formal assent to the sale and it is very doubtful to our minds whether Ragu Nath ever did so either, and we have great doubts as to the *bonâ fides* of the transaction.

Under all the circumstances of the case we hold that the second question referred to us "If so, was the sale bad," must be answered in the affirmative. The sale was not a valid sale for the reason given above, and the plaintiff's suit fails accordingly.

⁽¹⁾ I. L. R., XX Mad., p. 313.

Full Bench.

No. 24.

Before Mr. Justice Clark, Chief Judge, Mr. Justice Reid
and Mr. Justice Harris.

APPELLATE SIDE. {

GHULAM GHAS, — (PLAINTIFF), — APPELLANT,

Versus

NABI BAKHSI AND OTHERS, — (DEFENDANTS), —
RESPONDENTS.

Civil Appeal No. 279 of 1901.*

Punjab Courts Act, 1884, Section 40 - Land Suit - Value of Suit - Appeal
- Suits Valuation Act, 1887, Section 4.

In two suits by pre-emptors the market value of the properties sought to be pre-empted were found in each case by the Courts to be more than Rs. 250, and in a suit by a mortgagee the decree in his favour fixed a sum more than a thousand rupees (Rs. 1,000) as the amount to be paid by the mortgagor on redemption. In all three cases the value of the suits as laid by the plaintiffs was by the rules in force under the Suits Valuation Act for amounts less than those required by clauses (a) (1) or (b) (1) of Section 40 of the Punjab Courts Act to entitle the parties to an appeal to the Chief Court.

Held, that as all the decrees involved directly claims to or respecting properties in the pre-emption cases of the values of Rs. 250 and upwards and in the redemption case of more than Rs. 1,000, an appeal lay in each case to the Chief Court under clauses (a) (1) and (b) (1) of Section 40 of the Punjab Courts Act.

Bhag Mal v. Mohra ⁽¹⁾, *Lachman Das v. Hakim Singh* ⁽²⁾, *Bakhu v. Jhandu* ⁽³⁾, *Gul Muhammad Khan v. Khan Ahmad Shah* ⁽⁴⁾, *Kanshi Ram v. Sujan Singh* ⁽⁵⁾, and *Nanha v. Kura* ⁽⁶⁾, referred to.

Further Appeal from the decree of Captain G. C. Beadon, Divisional Judge, Jullundur Division, dated 22nd February 1901.

Muhammad Shafi, for appellant.

Lajpat Rai, for respondents.

The judgment of the learned Judges who constituted the Full Bench was delivered by

24th Nov. 1902.

HARRIS, J.—In each of three separate further appeals to this Court, the question has arisen whether a further appeal lies, and, in view of an apparent conflict between decisions of Division

* Civil Appeals Nos. 1472 of 1899 and 672 of 1901 were also disposed of by the judgment in this case.

⁽¹⁾ 169 P. R., 1888.

⁽²⁾ 94 P. R., 1890.

⁽³⁾ 145 P. R., 1892.

⁽⁴⁾ 29 P. R., 1893.

⁽⁵⁾ 132 P. R., 1893.

⁽⁶⁾ 3 P. R., 1896.

Benches of this Court in like cases, the matter has been referred to a Full Bench. Two of the cases referred are of pre-emption, and the third is a suit by a mortgagee, but as the decision turns in all three cases upon the interpretation to be put upon similar words in Section 40 of the Punjab Courts Act of 1884, and the arguments in all three cases have proceeded upon similar lines, I propose to discuss the cases together.

In the first case (Civil Appeal No. 672 of 1901) the 30 *jama* value of the suit for purposes of jurisdiction was Rs. 54-11, and plaintiffs claimed to pre-empt the land in suit on payment of Rs. 100. The first Court (Munsif, 2nd class) decreed the claim conditional on payment of Rs. 885-8. On appeal by plaintiffs to the Divisional Court, the price payable was reduced to Rs. 427-10. The further appeal to this Court is by the vendee to have the price fixed by the first Court restored.

In the second case (Civil Appeal No. 279 of 1901) the 30 *jama* value of the suit for purposes of jurisdiction was Rs. 80-10, and the claim was to pre-empt the land in suit on payment of Rs. 250. The land was nominally sold for Rs. 900 though the vendees urged its real value as Rs. 1,200. The first Court (Munsif, 2nd class) decreed the claim conditional on payment of Rs. 380. The Divisional Judge, on appeal by the vendees, increased the price to be paid to Rs. 900. There was a cross-appeal by plaintiff for reduction of the price to Rs. 250 which was dismissed, and which is the prayer of plaintiff-appellant in further appeal to this Court.

In both the above cases the question whether a further appeal lies depends upon the interpretation of Section 40, clause (1) (b) (1), Punjab Courts Act, as amended by Act XXV of 1899, which runs as follows:—

“A further appeal shall lie to the Chief Court (1)
 “(b) in a land suit (1) if the value of the suit is two
 “hundred and fifty rupees or upwards, or the decree involves
 “directly some claim to, or question respecting, property of like
 “value.”

In the third case (Civil Appeal No. 1472 of 1899) the suit was by a mortgagee for possession of land, the 30 *jama* value of the land being Rs. 771-14, and the first Court decreed the claim for possession, subject to right of redemption by defendant on payment of Rs. 4,418-12. The decree was affirmed by the Divisional Court.

The law of further appeal applicable to this last case is that laid down in Section 40, clause (1) (a), Punjab Courts Act XVIII of 1884, as it stood previous to the amending Act of 1899, and which runs:—

“ A further appeal shall lie to the Chief Court . . . (a) if
“ the value of the suit is one thousand rupees or upwards, or the
“ decree involves directly some claim to, or question respecting,
“ property of like value.”

There can be and is no question that the “ value of the suit ” in each of the above cases is the 30 *jama* value fixed by the Rules of this Court under the Suits Valuation Act and that value being in each of the first two cases less than Rs. 250, and in the third case less than Rs. 1,000 would, if that value alone had to be regarded, give no right of further appeal. The right thus depends upon the interpretation of the words “ or the decree “ involves directly some claim to, or question respecting, property “ of like value.”

The following is an abstract of the previous rulings of this Court having reference to the question referred :—

In *Bhag Mal v. Mohra* ⁽¹⁾ the further appeal was against a decree for redemption of mortgage on payment of Rs. 300, and was by the mortgagee, who alleged the mortgage-debt to be Rs. 3,000. It was held (by Plowden and Burney, JJ.), that the decree did not directly involve a question respecting property exceeding Rs. 300 in value. In that the 30 *jama* value was not under consideration.

In *Lachman Das v. Hakim Singh* ⁽²⁾, it was held by Stogdon and Beachcroft, JJ., that the value of the land, having been found on enquiry to be over Rs. 1,000, a further appeal by defendant-vendee against a decree for pre-emption on payment of Rs. 400 would lie.

In Civil Appeal No. 606 of 1891 (Benton and Rivaz, JJ.), a further appeal by plaintiff against a decree for pre-emption on payment of Rs. 1,500 of land of 30 *jama* value Rs. 150, asking reduction of price to be paid to Rs. 500, was held not to lie, as the decree did not directly involve a question respecting property of the value of Rs. 1,000 or upwards. *Bakhu v. Jhanda* ⁽³⁾, and *Bhag Mal v. Mohra* ⁽¹⁾, are cited in the judgment.

⁽¹⁾ 169 P. R., 1888.

⁽²⁾ 94 P. R., 1890.

⁽³⁾ 145, P. R., 1892.

In *Bokhu v. Jhanda* ⁽¹⁾, (Benton and Rivaz, JJ.), a further appeal by the alienee-defendant against a decree, plaintiff's reversionary rights in land of 30 *jama* value Rs. 770 alienated ostensibly for Rs. 1,300, was held not to lie, as the decree could not be said to involve directly a claim to, or question respecting, property of the value of Rs. 1,000 or upwards (see page 502).

In *Gul Muhammad Khan v. Khan Ahmad Shah* ⁽²⁾, (Plowden and Frizelle, JJ.), a further appeal by the defendant-vendee, alleging Rs. 4,500 and some land to be the price paid against a decree on payment of Rs. 2,322 for pre-emption of land of 30 *jama* value under Rs. 1,000, was held to lie, as the decree involved directly some claim to, or question respecting, property of the value of Rs. 1,000 or upwards.

In *Kanshi Ram v. Sujan Singh* ⁽³⁾, (Plowden and Bullock, JJ.), a further appeal against a decree for proprietary possession of land of 30 *jama* value under Rs. 1,000 was held not to lie. (This case is not directly applicable, but see remarks at page 514, per Plowden, J., and at page 517, per Bullock, J.)

In *Nanha v. Kura* ⁽⁴⁾, (Rivaz and Chatterji, JJ.), a further appeal against a decree dismissing the claim for pre-emption of land of 30 *jama* value under Rs. 1,000, on payment of Rs. 700, the price in the deed being Rs. 1,000, was held not to lie, as the decree merely dismissing the suit did not directly involve any question concerning the price to be paid by the pre-emptor. In that case *Gul Muhammad Khan v. Khan Ahmad Shah* ⁽²⁾, was approved of by way of *obiter dictum*.

Of these rulings *Lachman Das v. Hakim Singh* ⁽⁵⁾, Civil Appeal No. 606 of 1891, and *Gul Muhammad Khan v. Khan Ahmad Shah* ⁽²⁾ are directly in point as regards pre-emption suits. The decision in Civil Appeal No. 606 of 1891 was, however, based upon the assumed support of *Bokhu v. Jhanda* ⁽¹⁾, and *Bhag Mal v. Mohra* ⁽⁶⁾, and as the words "property of like value" clearly refer back to the money limit of the clause, and not to "the value of the suit," neither of the latter decisions could correctly be taken as a basis for holding that the price of Rs. 1,500 to be paid under the decree in appeal in No. 606 of 1891 was not directly involved in the decree. *Gul Muhammad Khan v. Khan Ahmad Shah* ⁽²⁾, on the other hand, though directly applicable, does not discuss the question at length, but in *Kanshi*

(1) 145 P. R., 1892.

(2) 29 P. R., 1893.

(3) 132 P. R., 1893.

(4) 3 P. R., 1896.

(5) 94 P. R., 1890.

(6) 169 P. R., 1888.

Ram v. Sujan Singh (1), at page 514, some examples are given, including pre-emption price in decree, of instances in which the decree was thought to involve directly some claim to, or question respecting, property which was not the actual subject-matter of the suit.

It is plain that the words under consideration must have some meaning, and it appears to me it is difficult to conceive a stronger case than one in which possession of land is given by decree conditional on payment of a certain sum of money. Where the payment of a price is a condition precedent to the possession under the decree, I cannot but consider that the decree "involves directly some claim to, or question respecting" that price, and that the sum of money indicating the price to be paid in a pre-emption case is "property." That the price to be paid on pre-emption of land or the charge on the land under mortgage often greatly exceeds the 30 *jama* value is not surprising considering that that value was arbitrarily fixed for all sorts of agricultural land throughout the province. Be that as it may, the law of appeal contemplates what the decree directly involves as well as the jurisdictional value of the suit.

I am, therefore, of opinion that in the first case (Civil Appeal No. 672 of 1901) referred, the decree directly involved some claim to, or question respecting, property of the value of Rs. 427-10, and in the second case (Civil Appeal No. 279 of 1901) of the value of Rs. 900. The words "claim to, or question respecting," seem to me very comprehensive, and not to be lightly construed against the right of appeal. It is the decree under appeal, and not the amount by which the appellant wishes the pre-emption price to be increased or reduced, or whether the appellant is vendee or pre-emptor, which has to be considered.

It follows that on my view a further appeal lies in both the pre-emption cases referred to the Full Bench.

Where, as in the third case referred, the decree is in favour of the mortgagee of land and fixes the money charge or amount to be paid on redemption by the defendant-mortgagor, it may at first sight be not so clear whether the decree can be said to "involve directly a claim to, or question respecting, property," of the value of the charge on the land. But where, as in the case under consideration, the decree actually fixes after contention the amount eventually payable by the mortgagor, I think the words of the clause apply. For the amount is *res-judicata*

between the parties, and may, and often does, form matter of appeal in the same way as the question of price to be paid for pre-emption. My opinion is therefore that in this case also the decree directly involved a claim to, or question respecting, property of the value of Rs. 1,000 or upwards, and that a further appeal lies.

No. 25.

Before Mr. Justice Chatterji and Mr. Justice Harris.

NABI BAKHSH,—(PLAINTIFF),—APPELLANT,

Versus

FAKIR MUHAMMAD AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 118 of 1900.

Pre-emption—Waiver of right in favour of stranger—Subsequent assertion of right against person with right superior to original vendee—Parties—Adding new defendant to suit—Civil Procedure Code, 1882, Section 32—Limitation—Limitation Act, 1877, Articles 10 and 120.

On 4th March 1898 G sold to F the land now in dispute. The deed was attested as a witness by one J who was the lambardar of the parties' village. On 24th February 1899 N instituted the present suit for pre-emption against the vendor and purchaser. On 13th March 1899 the vendee stated that he had sold the land to J on 23rd January 1899, thereupon the Court added J as co-defendant, who pleaded that the suit against him was barred by time, and that his right of pre-emption was equal to that of plaintiff.

Held, that attesting the deed and taking an active part in its registration amounts to a distinct waiver by J of his right to pre-empt, and having once waived his right with respect to the bargain J was estopped from asserting it against the present pre-emptor whose claim to pre-emption was superior to that of the original vendee.

Held, also, that as the plaintiff in order to succeed against J notwithstanding his, (J's) waiver, if his purchase was a genuine one, had to seek to enforce his right of pre-emption against him, the provision of the Limitation Act applicable was Article 10 of the second Schedule; and although the suit against F, the original vendee, was instituted within the period proscribed by that Article, J having been added as a co-defendant three days after the period allowed, the suit should be held barred unless the plaintiff could prove that the sale to J was fictitious.

Nabi Bakhsh v. Kaka Singh ⁽¹⁾, *Futteh Chand v. Nihal Singh* ⁽²⁾, *Abdul Rab v. Muhammad Ji* ⁽³⁾, *Imam-ud-din v. Liladhar* ⁽⁴⁾, and *Horak Chand v. Dab Nath Shai* ⁽⁵⁾, cited.

⁽¹⁾ 42 P. R., 1878.

⁽²⁾ 8 P. R., 1882.

⁽³⁾ 106 P. R., 1880.

⁽⁴⁾ I. L. R., XIV All., 524.

⁽⁵⁾ I. L. R., XXV Calc., 409.

Grish Chander Susmal v. Derarkanath Dinda ⁽¹⁾, and *The Oriental Bank Corporation v. Charriol* ⁽²⁾, disapproved.

Mutsadda Singh v. Hamira ⁽³⁾, and *Khan Muhammad Shah v. Muhammad Jan* ⁽⁴⁾, distinguished.

Further appeal from the decree of H. Scott Smith, Esquire, Divisional Judge, Amritser Division, dated 19th December 1899.

Muhammad Shafi, for appellant.

Sukh Dial, for respondents.

The facts of the case are fully stated in the judgment of the Court delivered by—

24th Dec. 1902.

HARRIS, J.—On the 4th March 1898, Ghulam Mohi-ud-din, defendant 2, executed a deed of sale of the land in suit in favour of Fakir Muhammad, defendant. The deed, in which the price was stated as Rs. 1,200 out of which Rs. 600 were to be paid to mortgagees, was registered on the 10th March 1898. Jhandu, defendant 3, who is lambardar of the village of the parties, attested the deed as a witness, and was also present as a witness at registration. The suit by Nabi Bakhsh, plaintiff, was instituted on the 24th February 1899. On the 13th March 1899, when the case came on for hearing, Fakir Muhammad stated that he had, on the 23rd January 1899, sold the land to Jhandu. Jhandu was added as co-defendant on the 13th March 1899 by order of the Court.

Jhandu pleaded that the suit against him was barred by time, and that his right of pre-emption was equal to that of plaintiff. Issues were framed on those pleas, and also as to the price to be paid.

The first Court held the claim not to be barred by time, on the ground that Jhandu had been added as defendant by an order of Court under Section 32, Civil Procedure Code; that as the plaintiff had an ancestral share in the *patti*, while the vendees were proprietors therein only by purchase, plaintiff's right was preferential; that Jhandu had waived his right by witnessing the deed of sale. An opinion was also expressed that the second sale was collusive.

It was found that only Rs. 1,000 had been paid, which sum represented a fair market value, and a decree was given conditional on payment of that sum, the payment being thus arranged; out of Rs. 600 deposited in Court Rs. 400 to be paid to Jhandu,

⁽¹⁾ *I. L. R.*, XXIV Calc., 640.

⁽²⁾ *I. L. R.*, XII Calc., 642.

⁽³⁾ 11 P. R., 1893.

⁽⁴⁾ 104 P. R., 1882.

and Rs. 200 restored to the plaintiff who was to pay Rs. 600 to mortgagee.

Fakir Muhammad and Jhandu appealed and their appeal raised the questions of right, waiver, limitation and price.

In the matter of limitation the lower Appellate Court held that as the suit against Jhandu was one to prove a better right, Article 120, Schedule II of the Limitation Act applied and not Article 10, following the decision in *Mutsaddu Singh v. Hamira* ⁽¹⁾ and that even if Article 10 applied, time only began to run with regard to Jhandu from the date of the sale to Jhandu, and that consequently the suit was within time. It was further held that the pre-emptive rights of plaintiff and Jhandu were equal, and that, though there was a fair presumption that Jhandu had waived his claim to pre-empt, he could resist a suit of a rival pre-emptor on the ground that he had purchased from the original vendee, and having an equal right with plaintiff he was entitled to retain the land in suit which he had purchased prior to suit. No decision as to price was given. The appeal was accepted, and plaintiff's suit was dismissed.

Plaintiff has preferred this further appeal. Ghulam Mohi-ud-din is reported to have died. But he is not, as vendor, a necessary respondent and the appeal can proceed without him.

We are unable to agree with the lower Appellate Court that even if Jhandu waived his claim to pre-empt he can resist the present claim on the merits. In *Nabi Bakhsh v. Kaka Singh* ⁽²⁾, it was held that a pre-emptor who has once waived his right cannot afterwards come forward and re-assert his right against another person who has claimed and obtained a decree for pre-emption. The obtaining of the decree does not, as the Divisional Judge appears to think, distinguish that case from the present. The point is that the right once waived cannot be re-asserted. Further if Jhandu acquiesced in the purchase by Fakir Muhammad, he, as sub-purchaser of Fakir Muhammad, is estopped from asserting his waived right against plaintiff whose claim to pre-emption is superior to that of Fakir Muhammad *e. f. Fattah Chand v. Nihal Singh* ⁽³⁾. As a fact we consider there was a distinct waiver, and that was found by both Courts, Jhandu not only attested the deed as a witness, but also took an active part in the registration six days later. He must have had full knowledge of the transaction, and it may be, as the first Court was inclined to

(1) 11 P. R., 1893. (2) 42 P. R., 1878.

(3) 106 P. R., 1890.

think, that when plaintiff's intention to sue became known in the village, Jhandu colluded with Fakir Muhammad and entered into a fictitious transaction to defeat the claim. We do not consider that, as is contended for respondents, Jhandu merely signed as an identifying witness. As remarked in *Abdul Rab v. Muhammad Ji* ⁽¹⁾, "it is a common practice in places where a contrary right of pre-emption is known or is believed to exist, to procure the signature of a pre-emptor to the deed of sale to another person, as proof of the pre-emptor's assent," and that is what we find to have been done in this case.

But plaintiff, to succeed, must show his claim as against Jhandu to be within time, Jhandu having been added as defendant three days after the expiry of the one year of Article 10, if that article is applicable. Section 22 of the Limitation Act is very definite, and it is clear that under that section the suit, as against Jhandu, must be considered to have been instituted on the 13th March 1899. The argument adopted by the first Court, and again here urged that, as Jhandu was added as defendant by order of Court under Section 32, Civil Procedure Code, the suit is within time, is, we consider, untenable. *Grish Chander Sasmal v. Devarkanath Dinda* ⁽²⁾, which followed *The Oriental Bank Corporation v. Charriot* ⁽³⁾, is cited. But we agree with the remark in *Imam-ul-din v. Liladhar* ⁽⁴⁾, that the Calcutta ruling apparently only decided that limitation does not preclude a Court from acting under Section 32, and that, "it is not obvious how the observations of the learned Judges in that case could be reconciled with the specific provisions of Section 22 of the Indian Limitation Act, 1877, if those observations are to be read as implying that any Court could do otherwise than dismiss a suit which was barred by limitation." And in a later Calcutta case, *Harak Chand v. Deonath Sohay* ⁽⁵⁾ the provisions of Section 22 were strictly applied, though the application involved a hardship.

It thus seems that if Article 10 governs the suit as against Jhandu the claim is time barred. But it is contended for plaintiff that, as regards Jhandu, Article 120 and not Article 10 is applicable, and *Mutsadda Singh v. Hamira* ⁽⁶⁾ is cited. In that case the added defendant was a rival pre-emptor claiming in a separate suit, and it was held that Article 10 had no application, because the plaintiff did not seek to enforce any right of pre-emp-

⁽¹⁾ 8 P. R., 1882.

⁽²⁾ I. L. R., XXIV Calc., 640.

⁽³⁾ I. L. R., XII Calc., 642.

⁽⁴⁾ I. L. R., XIV All., 524.

⁽⁵⁾ I. L. R., XXV Calc., 409.

⁽⁶⁾ 11 P. R., 1893.

tion as against the rival pre-emptor, "but merely to establish "that he has no rights of pre-emption superior to his own, and to "bind him by the decree eventually to be passed in plaintiff's "favour," and that as such a suit was not specifically provided for Article 120 applied.

We do not consider the ruling applicable to the present case. Notwithstanding his waiver Jhandu, if the sub-purchase was genuine, is the transferee of Fakir Muhammad, and so plaintiff has, in order to succeed, to enforce his alleged right against Jhandu. It is true that Jhandu sets up a pre-emptive right against plaintiff as a defence to the suit, and that *Khan Muhammad Shah v. Muhammad Jan* ⁽¹⁾ which was cited for respondent, is not exactly in point, as in that case the added defendant was a co-vendee in the original purchase. But Jhandu is not suing to enforce a right, and if his purchase from Fakir Muhammad was genuine, his waiver or inferior right or entire want of right of pre-emption does not save limitation, as he derives his right to retain the subject of sale from the original purchaser, and the waiver does not alter the nature of the suit or the cause of action.

For these reasons we are of opinion that Article 10 applies to the suit against Jhandu, and consequently the claim is time barred, unless it be established that the sale to Jhandu was fictitious, in which case plaintiff should succeed.

The question whether the sub-purchase was collusive and fictitious remains. It is a matter which seems, probably owing to a want of proper examination of parties, to have escaped the notice of the first Court until it came to judgment, while it was not considered at all by the Divisional Court. Also if the purchase by Jhandu was fictitious it will be necessary for the lower Appellate Court to determine the question of price to be paid which was raised there by defendants' appeal. We therefore set aside the order of the Divisional Judge, dismissing the claim, and remand the case to the Divisional Court under Section 562, Civil Procedure Code, for decision with reference to the above remarks. The Divisional Court will, if necessary, send down an issue for trial to the first Court in the matter of the fictitious nature of the sub-purchase. Stamp on appeal in this Court to be refunded. Other costs in this Court to be costs in the cause.

Appeal allowed—Cause remanded.

(1) 104 P. R., 1882.

No. 26.

Before Mr. Justice Chatterji and Mr. Justice Harris.

MUSSAMMAT BAKHAN AND ANOTHER,—(DEFENDANTS),—

APPELLANTS,

Versus

ALA BAKHSH,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 1388 of 1899.

Declaratory decree—Marriage—Suit for a declaration that the defendant is not the lawful wife of the plaintiff—Jurisdiction of Civil Court to entertain such a suit when an order for maintenance passed under Section 488 of the Criminal Procedure Code is in force against the plaintiff—Specific Relief Act, Section 42.

Held, that a suit by a person against whom an order for maintenance in favor of defendant has been made by a Criminal Court under Section 488, Criminal Procedure Code, lies in a Civil Court for a declaration that the defendant is not his wife.

Mussammat Baji v. Nawab Khan ⁽¹⁾, *Subhudra v. Basdeo Dube* ⁽²⁾, *Subad Domni v. Kateram Dome* ⁽³⁾, *Aunjona Dasi v. Problad Chandra Ghose* ⁽⁴⁾, and *Jagat Singh v. Jit Singh* ⁽⁵⁾, referred to.

Further appeal from the decree of Kazi Muhammad Aslam, C. M. G., Divisional Judge, Jhelum Division, dated 29th June 1899.

Golak Nath, for appellants.

Shelverton and Ganpat Rai, for respondent.

The judgment of the Court (so far as is material for the purposes of this report) was delivered by—

15th Dec. 1902.

HARRIS, J.—The question on which this application for revision was admitted as a further appeal is whether a suit by a person against whom an order for maintenance in favour of defendant has been made by a Criminal Court under Section 488, Criminal Procedure Code, lies in a Civil Court for a declaration that the defendant is not his wife.

The status of husband of the defendant, Mussammat Bakhan, and of father of the minor defendant, Khuda Bakhsh, was denied by plaintiff in the Criminal Court, but found against him, and an order for the maintenance of the minor defendant was passed.

The question whether such a suit would lie was for the first time taken orally before the learned Judge who admitted the

⁽¹⁾ 21 P. R., 1894, Cr.

⁽²⁾ 20 W. R., 58, Cr.

⁽³⁾ I. L. R., XVIII All., 29.

⁽⁴⁾ 6 Beng. L. R., 243.

⁽⁵⁾ 41 P. R., 1876.

petition as a further appeal and who has referred the whole case to this Bench. But though on objection taken we consider we have a discretion to decide at this stage whether the application should have been admitted as a further appeal, even though the order of admission was not *ex parte*, we have not thought fit to refuse to hear counsel on a point which might be fatal to plaintiff's decree.

It is contended for appellant that Section 42, Specific Relief Act, is inapplicable, as plaintiff was not suing for a declaration that he is entitled to any legal character, and that at all events the case is not one in which a Civil Court should exercise a discretion in plaintiff's favour. With this contention we cannot agree. The legal character contemplated in the section may, we apprehend, be in the affirmative or negative, in other words, that a certain legal relation does, or does not exist. Further though it would be, even if not without jurisdiction, improper for a Civil Court to exercise a discretion in declaring a plaintiff not subject to a Magistrate's order for maintenance, the declaration here sued for, *viz.*, that Mussammat Bakhari is not plaintiff's wife, and Khuda Bakhsh not plaintiff's legitimate son, covers other civil rights than those of maintenance, and the question cannot be determined on that ground alone. And with reference to an order for maintenance of a wife as has been pointed out in *Mussammat Baji v. Nawab Khan* (1), that order, which is of a quasi civil nature, is not exhaustive, in that the Magistrate, if subsequently he finds an allegation of divorce established, may refuse to enforce his order.

Subhendra v. Basdeo Dube (2), and *Subad Domni v. Katiram Dome* (3), have been referred to in support of appellants' contention that the suit does not lie. The latter case was a criminal reference dealt with by a single Judge, and the point actually decided was only that the decree of a Civil Court cannot affect the order of the Magistrate, and we must regard the further remark of the learned Judge that the Civil Court had no jurisdiction to make a declaratory order as to the paternity of the child in question as *obiter dictum*. It may be added that the above ruling was prior to the Specific Relief Act, and pronounced at a time when Section 15, Act VIII of 1859, defined the power of Civil Courts to grant declarations. In the Allahabad case the prayer was for a declaration that the woman was of loose character and outcasted, that the child born of her was not begotten of the

(1) 21 P. R., 1894, Cr.

(2) I. L. R., XVIII All., 29,

(3) 20 W. R., 58, Cr.

plaintiff, that the woman be declared to have no right of maintenance, and that there was no relationship of husband and wife between the parties. The learned Judges said, "These reliefs are "not reliefs which a Civil Court can grant, especially under the "circumstances of the present case. What the respondent seeks "to do is to set aside the maintenance orders passed by the "Magistrate, who had full jurisdiction to pass them and to "declare that they are of no force."

The first case was cited in support of the view taken. It would seem that the decision proceeded upon the special facts of the case, and rested almost entirely on the indisputably correct position that the Civil Court could not set aside the maintenance order of the Magistrate. With the view that none of the reliefs sought could be granted by a Civil Court, the grounds of which view were not discussed, we do not, with all deference to the opinion of the learned Judges, agree. Had there been no maintenance order could not the Civil Court have granted a declaration? In *Aunjona Dasi v. Prabhlal Chandra Ghose* (1), before the passing of the Specific Relief Act it was held that a suit for a declaration that an alleged Hindu marriage was invalid would lie. In *Jagat Singh v. Jit Singh* (2), a suit for a declaration that plaintiff was the son of defendant was held to lie as consequential relief would follow the result of the suit. And now under Section 42, Specific Relief Act, where a plaintiff is not able to seek further relief a mere declaration may be granted. Illustration (h) to that section is a case in point. There are many civil rights arising out of the contract of marriage other than of maintenance. Surely the Magistrate's order would not make the questions of marriage or legitimacy *res-judicata* in a suit for dower, or in a suit by a putative son to set aside an alienation by his putative father. Section 11 of the present Code of Civil Procedure gives the Civil Courts' jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force. There is no provision in the Criminal Procedure Code which bars a suit of the nature of the present suit which is plainly one of a civil nature. For the above reasons we hold the suit, which is not one to set aside the Magistrate's order for maintenance of the child, an order sustainable merely on the ground of paternity without marriage, to be a suit which the Civil Courts had jurisdiction to try.

(The rest of the judgment is not material for the purposes of this report.—ED., P. R.)

No. 27.

Before Mr. Justice Reid and Mr. Justice Harris.

NAND LAL,—(PLAINTIFF),—APPELLANT,

*Versus*GOPAL SAHAI AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 85 of 1902.

Jurisdiction—Place of suing—Consent to Jurisdiction—Waiver—Civil Procedure Code, 1882, Sections 17, 20.

Held, that, where the cause of action in a suit had not arisen within the jurisdiction of the Court in which a suit was instituted and only one of several defendants resided within that jurisdiction and no permission for the institution had been obtained in accordance with the proviso to Section 17 of the Code of Civil Procedure, the non-resident defendants, who objected to the jurisdiction in their written statements, could not be held to have acquiesced in that jurisdiction by reason of their failure to apply under Section 20 of the Code.

Virarajava v. Krishnasami (1), and *Ismail Peer Ambalam v. Neelamegam Serrai* (2), not followed.

Miscellaneous appeal from the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 16th December 1901.

Shadi Lal, for appellant.

Browne, for respondents.

The judgment of the Court was delivered by—

REID, J.—The question referred for decision is “whether, 13th Feby. 1903.
“when a cause of action for suit has not arisen in a district where
“plaint is filed, but one of two or more defendants resides within
“the jurisdiction of the said Court and no leave for institution has
“been obtained in accordance with the proviso to Section 17 of the
“Code of Civil Procedure, the objecting defendants should be held
“to have submitted to the jurisdiction of the Court because they
“have not put Section 20 in force and applied for stay of proceed-
“ings as prescribed therein.” The suit was instituted in the Rohtak
District Court. The Lower Appellate Court found that the cause
of action did not arise in the Rohtak District, in which the plain-
tiff-appellant and one of the defendant-respondents, only resided,
while both respondents carried on business in the Delhi District,
and ordered that the plaint be returned for presentation in the
Delhi Court.

(1) *I. L. R.*, VI Mad., 344.(2) *VIII Mad.*, L. J., 38.

In the Court of first instance the respondents pleaded that the Rohtak Court had not jurisdiction and the first issue framed was whether it had jurisdiction. It is admitted that permission was not given by that Court under the proviso to Section 17 (c) of the Code, but counsel for the appellant contended that the defendant who did not reside within the jurisdiction acquiesced in the institution by his failure to apply, under Section 20 of the Code, to the Court to stay proceedings. *Viraragava v. Krishnasami* ⁽¹⁾, and *Ismail Peer Ambalam v. Neelamegam Servai* ⁽²⁾, have been cited in support of this contention. These authorities are directly in point, but we are unable to follow them. In the latter case the learned Judges said, "a bare objection to the jurisdiction is not a "compliance with the law" (contained in Section 20) "and, in "the absence of such compliance, the defendant must be deemed "to acquiesce in the institution of the suit in the Court in which it "is." In the former case the non-resident defendant objected in his written statement to the jurisdiction, but the Court held that this was insufficient, inasmuch as he should have proceeded under Section 20 of the Code. The learned Judges said, "The "last paragraph in Section 20 appears to us specially applicable "to Section 17 (b), for no acquiescence is necessary to give jurisdiction under Sections 13, 18 or 19, the evident intention of the "Legislature was that the question of jurisdiction over defendants, "non-resident, etc., under Section 17 (b) should be raised on the "first opportunity, and that, if it was not then raised in the manner pointed out by Section 20, it should not be afterwards raised "by plea." In the Madras Law Journal case the Court expressed the opinion that Section 17 (b) in the above cited passages was a clerical error for Section 17 (c), and in this opinion we concur, though we are unable to concur in the view that a non-resident defendant who objects in his written statement, filed under Section 110 of the Code before or at the first hearing and before issues are framed, is to be treated as if he had not objected "at the earliest "possible opportunity and . . . before the issues are settled."

The argument based on the necessity for expedition has, therefore, in our opinion, no force, and Section 20 applies, in our opinion, to those cases only in which a suit may be instituted in more than one Court without any special permission or acquiescence as in cases falling within the proviso to Section 16, or Section 17 (a) and (b), where either the Court within whose jurisdiction the cause of action arose or that in whose jurisdiction all the defend-

(¹) *I. L. R., VI Mad.*, 344. (²) *VIII Mad. L. J.*, 38.

ants reside, etc., may be selected, or Section 18 or Section 19 of the Code. In each of these cases the plaintiff may choose the form and the Court may, on the application of a defendant who does not reside, etc., within its jurisdiction, proceed under Section 20.

The argument in the VI Madras case, that no acquiescence is necessary to give jurisdiction under Sections 16, 18 or 19 has, in our opinion, no force. The last paragraph of Section 20 is intended, in our opinion, to preclude the defendant from applying for stay with a view, *e.g.*, to a transfer from the Court within the jurisdiction of which the cause of action arose to the Court within the jurisdiction of which he resides, at an inconveniently late stage of the proceedings.

Only the leave of the Court or acquiescence gives jurisdiction to a Court within whose jurisdiction the cause of action has not arisen or all the defendants do not reside, etc., and there is not jurisdiction until the fulfilment of one of these conditions. Section 17 (c) is, in our opinion, an exception to the rule that consent of parties does not confer jurisdiction, and permission of the Court or consent of the non-resident, etc., defendant is a condition precedent to the suit proceeding; while suits instituted under the other provisions of the Code cited above may proceed in the Court selected by the plaintiff unless that Court, on the application of the non-resident, etc., defendant, adopts the special procedure prescribed by Section 20. Section 17 (c) confers a special jurisdiction, while Section 20 limits the jurisdiction conferred by other provisions of the Code.

The concluding sentence of Section 20 does not, in our opinion, refer to the "acquiescence" prescribed in Section 17 (c), and we are unable to hold that a defendant who has pleaded want of jurisdiction at or before the first hearing can be held to have acquiesced in that jurisdiction by reason of his failure to apply under Section 20. Our answer to the reference is, for these reasons, in the negative.

(NOTE.—The remainder of the judgment is not material for the purposes of this report.—ED., P. R.)

No. 28.

Before Mr. Justice Clark, Chief Judge.

HARI CHAND,—(PLAINTIFF),—APPELLANT,

Versus

JIWAN MAL AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 376 of 1902.

Partition—Suit to enforce a right to share in joint family property—Valuation for purposes of jurisdiction and Court fee—Court Fees Act, 1870, Section 7 (iv) (b)—Suits Valuation Act, 1870, Section 8.

Held, that for purposes of Court fees in a suit to enforce a right to share in joint family property by partition and for the delivery of the possession to the plaintiff of his share, the value of the suit is the amount at which the plaintiff values his share. In such cases the value as determinable for the computation of Court fees and the value for purposes of jurisdiction are identical.

Boidya Nath Adya v. Makhan Lal Adya ⁽¹⁾, *Balvant Ganesh v. Nana Chintamon* ⁽²⁾, and *Raghubar Dial v. Salig Ram* ⁽³⁾, referred to.

Bawa Mangal Das v. Mahant Narinjan Das ⁽⁴⁾, and *Guruvajamma v. Venkatakrishnama Chetti* ⁽⁵⁾, distinguished.

Miscellaneous first appeal from the order of Lala Achhru Ram, District Judge, Ferozepore, dated 8th May 1902.

Shadi Lal, for appellant.

The judgment of the learned Chief Judge was as follows :—

12th Nov. 1902.

CLARK, C. J.—This claim is described in the plaint as a claim for settlement of accounts and recovery of one-ninth share of the joint property of the parties, such share being valued at Rs. 50,000.

The plaint alleges that plaintiff and defendants are joint, plaintiff's share being one-ninth, that their business was conducted jointly until August 1900, when defendants repudiated plaintiff's rights, and turned him out of the firm. Defendants are in possession of the whole property of the firm, which plaintiff values at between four and five lakhs of rupees.

The reliefs sought by plaintiff are that defendants may be required to render account of the whole joint property of the parties, consisting of lands, houses, shops, grain, cash, jewellery, cattle, clothing, furniture, *hundis*, account books and other documents, and that plaintiff may be granted his one-ninth share thereof.

⁽¹⁾ I. L. R., XVII Cal., 680.

⁽²⁾ 104 P. R., 1895.

⁽²⁾ I. L. R., XVIII Bom., 209.

⁽⁴⁾ 56 P. R., 1895.

⁽⁵⁾ I. L. R., XXIV Mad., 34.

The plaint winds up by saying that plaintiff fixes the value of the relief sought for at Rs. 5,250 for the purposes of the Court Fees Act.

The District Judge has returned the plaint for amendment, for revaluation of the property and for the plaint to be stamped according to the valuation.

Though I do not agree with the reasons given by the District Judge for his order, I think that the order itself is correct.

Plaintiff has appealed from that order, and his counsel argues that the case comes under Section 7 (*w*) (*b*) of the Court Fees Act, and is a suit to enforce the right to share in property on the ground that it is joint family property. In this contention I agree, he further argues that by the last paragraph of that section plaintiff was entitled to value the relief sought at Rs. 5,250.

In this contention I cannot agree, he quotes *Bawa Mangal Das v. Mahant Narinjan Das* ⁽¹⁾, and *Gururajamma v. Venkatakrishnama Oketti* ⁽²⁾.

In the Punjab Ruling the suit was for the removal of a *Mahant*, and it was held that when the plaintiff has valued his relief at a sum which is *prima facie* not unreasonable, it is not open to the Court to challenge or revise such valuation.

In the Madras case the suit was for an injunction, and it was held that the Court could not interfere with the amount at which plaintiff valued the relief sought.

Those two cases are easily distinguishable from the present case, the removal of a *Mahant* and an injunction are matters indefinite, and extremely difficult of valuation, but in this case plaintiff sues for certain definite property which for one purpose he values at Rs. 50,000 and for another purpose at Rs. 5,250.

I think the principle laid down in *Boidya Nath Adya v. Makhan Lal Adya* ⁽³⁾, that the Court Fees Act, Section 7, clause (*iv*) does not contemplate that a plaintiff should assign an arbitrary value to the subject matter of the suit is applicable to this case.

In *Balwant Ganesh v. Nana Chintamon* ⁽⁴⁾ in a suit for partition and possession of plaintiff's share of joint family property, plaintiff was not allowed to value the suit for purposes of Court Fees, but it was held that the Court fee must be *ad valorem*.

⁽¹⁾ 56 P. R., 1895.

⁽²⁾ I. L. R., XXIV Mad., 34.

⁽³⁾ I. L. R., XVII Cal., 680.

⁽⁴⁾ I. L. R., XVIII Bom., 209.

In *Raghar Dial v. Sali Ram* ⁽¹⁾, the exact point now raised was not decided, but it was held in a case similar to this that the proper Court fee was *ad valorem*.

Plaintiff has given no explanation as to why he has valued the relief sought at Rs. 5,250, almost the minimum sum which gives a right of first appeal to the Chief Court. In my opinion it is not permissible for a plaintiff to value the relief sought for purposes of Court fee at an arbitrary value inconsistent with his own valuation in the plaint of the property claimed.

I dismiss the appeal.

Appeal dismissed.

No. 29.

Before Mr. Justice Reid.

SUNDAR SINGH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

APPELLATE SIDE. {

Versus

SAIN DITTA AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 52 of 1903.

Custom—Alienation—Alienation by sonless proprietor—Right of reversioner to contest such alienation in presence of wife and daughter-in-law—Right to sue—Kalar Jats of tahsil Jagraon, Ludhiana District—

A, a sonless proprietor sold his house to two of his collaterals, S. and G. The plaintiffs, who were nearer collaterals, sued for a declaration that the sale being without necessity, should not affect their reversionary rights and should be held to be null and void after the death of A. The defendants pleaded that as A's wife and daughter-in-law were alive the plaintiffs had no *locus standi*. It was found that among the parties, who were Kalar Jats of the Jagraon tahsil, a widow was entitled on her husband's death to possession of his immovable property for her life or until re-marriage, and that a daughter-in-law was entitled only to maintenance out of his estate.

Held, that as the right of succession of the widow was only a "widow's estate," the plaintiffs, who were the nearest presumptive reversionary heirs, were entitled to maintain their action for a declaration irrespective of the question of collusion or concurrence by the widow, but were not entitled to possession until after the death or re-marriage of the widow in the event of her surviving A.

Balgobind v. Ram Kumar ⁽²⁾, and *Mussammat Ram Kaur v. Bhagwana* ⁽³⁾, cited.

Madari v. Malki ⁽⁴⁾, and *Ishwar Narain v. Janki* ⁽⁵⁾, not followed.

⁽¹⁾ 104 P. R., 1895.

⁽³⁾ 127 P. R., 1894.

⁽²⁾ I. L. R., VI All., 431. ⁽⁴⁾ I. L. R., VI All., 428.

⁽⁵⁾ I. L. R., XV All., 132.

Further Appeal from the decree of D. C. Johnstone, Esquire, Divisional Judge, Umballa Division, dated 26th February 1901.

Harris, for appellants.

Vishnu Singh, for respondents.

At the first hearing of this appeal the judgment of the learned Judge was as follows :

REID, J.—This is an application under Section 70 (1) (a) and (b) of the Courts Act, and, inasmuch as the suit was unclassified and of the value of Rs. 290, I treat it as having been admitted as an appeal under Section 70 (1) (b) the second ground taken being a question of law of some importance. 1st March 1902.

That ground deals with two questions :—

1. Of the right of the plaintiffs to sue for a declaration during the life of female heirs, whose rights have priority over theirs :

2. Of the right of the plaintiffs to take possession immediately on the death of the childless proprietor.

On the 1st question the authorities cited by counsel for the defendant-appellants are *Madari v. Malki* ⁽¹⁾, and *Ishwar Narain v. Janki* ⁽²⁾. These authorities are in conflict with *Balgobind v. Ram Kumar* ⁽³⁾, in which it was held that the existence of female heirs, whose right of succession cannot surpass a widow's estate, does not bar a suit by the nearest presumptive revisionary heir to the full ownership of the estate, for a declaration, irrespective of the question of collusion or concurrence by such female heirs.

The present case is still stronger. The alienation was a sale which could not be impugned by the female heirs, except in so far as their right of residence in the house alienated or their right to maintenance might have been affected.

In *Mussammatt Ram Kaur v. Bhagwan* ⁽⁴⁾, it was held that a widow had no *locus standi* to sue for possession of land given by her husband to a stranger, not being in a position to control her husband's dealings with his estate, when sufficient provision had been made for her maintenance after his death.

In the present suit the plaintiffs sued on the ground that the alienor was in possession of land amply sufficient for his maintenance, and no question either of the right of female heirs to maintenance or to residence has been raised.

⁽¹⁾ I. L. R., VI All., 428.

⁽²⁾ I. L. R., VI All., 431.

⁽³⁾ I. L. R., XV All., 132.

⁽⁴⁾ 127 P. R., 1894

The existence of such heirs is no bar to the suit for a declaration, and the question, whether the plaintiffs are entitled to possession at the death of the alienor or whether their right to possession does not arise until after the death of the female heirs, remains. The alleged heirs are Mussammat Haro, widow, and Mussammat Ram Kaur, widowed daughter-in-law. If either of these women has a life interest in the alienor's property, the possession of the plaintiff must, in my opinion, as at present advised, be possession until after the death of such female heir. Under Section 566 of the Code of Civil Procedure I remand to the Lower Appellate Court for decision the following issues:—

1. Have Mussammat Haro and Mussammat Ram Kaur or has either of them a right to the immovable property of Achhar on his death preferential to the right of the plaintiff?

2. If such right exists in either of these women, is it for life or until marriage?

Ten days will be allowed for objections.

On receipt of a return to the above order of remand the final judgment of the learned Judge was as follows:—

24th Jany. 1903.

REID, J.—My judgment of the 1st March 1902 will be read with this.

The finding on remand is that Mussammat Haro, the widow of the vendor, was entitled on her husband's death to possession for her life or until her re-marriage of the immovable property left by him, as against his collaterals; and that Mussammat Ram Kaur, his daughter-in-law, was entitled only to maintenance out of his estate. The plaintiff-respondents have not objected to this finding and I see no reason to dissent from it.

The result is that the defendant-appellants are entitled to possession of the property in suit until the death or re-marriage of Mussammat Haro in the event of her surviving Achhar, after which the plaintiff-respondents will be entitled to possession on payment of Rs. 40 to the defendant-appellants.

The appeal is decreed to this extent. Parties will bear their own costs of all Courts.

Appeal allowed.

No. 30.

*Before Mr. Justice Reid and Mr. Justice Harris.*MUSSAMMAT JAMNA DEVI,—(DEFENDANT),—
APPELLANT,*Versus*

CHUNI LAL,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 231 of 1902.

Custom—Inheritance—Tewari Brahmins of Amritsar City—Right of nephew to succeed in preference to daughter's son—Hindu Law.

Held, that plaintiff has failed to prove that Tewari Brahmins of the city of Amritsar are governed by custom, by which a daughter's son is excluded in succession by a nephew, and that in the absence of such custom the personal law of the parties (Hindu Law) must prevail according to which a nephew has no right to succeed in preference to a daughter's son.

Chandika Bakhsh v. Muna Kunwar ⁽¹⁾, and *Mussammât Mulo v. Phulo Missar* ⁽²⁾, cited. *Prabh Dial v. Devi Dial* ⁽³⁾, and *Mohan Lal v. Devi Das* ⁽⁴⁾, distinguished.

Further appeal from the decree of H. Scott Smith, Esquire, Divisional Judge, Amritsar Division, dated 7th September 1901.

Sohan Lal, for appellant.

Ganpat Rai, for respondent.

The judgment of the Court was delivered by—

HARRIS, J.—In this further appeal the decision depends entirely upon the question whether custom or Hindu Law is to govern the succession. The deceased was a Tewari Brahmin of Amritsar city who left a small estate in house property, and the conflict is between a nephew (plaintiff) and a daughter's son (defendant, since deceased and now represented by his widow). The lower Courts have found the instances adduced sufficient to prove a custom amongst Tewari Brahmins of Amritsar city whereunder a nephew excludes a daughter's son in succession. The plaintiff's claim having been decreed the defendant applied to this Court for revision, and the application was admitted as a further appeal on the point of custom.

10th Feby. 1903.

The Tewari Brahmins of Amritsar are said to have migrated from Oudh. They are clearly a non-agricultural class. It is to

⁽¹⁾ *I. L. R.*, XXIV *All.*, 273.⁽²⁾ 108 *P. R.*, 1888.⁽³⁾ 116 *P. R.*, 1893.⁽⁴⁾ 43 *P. R.*, 1892.

be presumed that after migration they retained the law or custom of their sect in the country of their adoption. It is not alleged that in the country of their origin they followed any such custom as is here set up. In a case like the present the evidence that these Tewari Brahmins, who undoubtedly at one time followed Hindu Law and who reside in a large city have, by contact with other tribes or for some other reason, assimilated the agricultural custom of the Punjab wheresunder the male agnate usually excludes the daughter and her issue, should be strong and convincing, and where, as in this case, there is an entire absence of judicial decision one way or the other the instances in which the alleged custom is asserted to have been followed should be fairly numerous and well ascertained.

We do not find the instances mentioned in the evidence and detailed by the Divisional Judge to be either numerous or properly ascertained. Indeed all the Divisional Judge can say for those instances is that they are not all valueless, and his decision would seem to rest mainly on the want of proof of Hindu Law, forgetting that, in the absence of proof of custom, the personal law of the parties must be applicable.

Plaintiff produced Chajju Mal, Parmeshri Das, Devi Ditta and Gopi to prove custom. Between them they alluded to the following cases:—

1. Achhru Ram was a Tewari of Batala. His nephews are said to have succeeded to his estate. The extent and nature of the estate are not disclosed. The daughters appear to have lived in Jullundur, but they are not named by any witness and apart from the fact that the property was joint family property, the want of contest may have been due to distance or small value. The case is not of Amritsar.

2. Chand was maternal grandfather of Chajju, witness. Chajju mentioned that he was excluded by nephews, but he had to admit that his father obtained a shop from Chand as a gift, a fact pointing to family arrangement which is further indicated by mention of a partition in Chand's life time. Even in this case the particulars given are meagre. The chief witness, Parmeshri Das, cannot remember Chand.

3. Malli was first cousin of Kaura (father of Duni Chand and Beli Ram). Plaintiff is son of Beli Ram. Duni Chand and Beli Ram appear to have succeeded to Malli by survivorship. This would have happened under Hindu Law.

4. Bam's nephews are said to have succeeded. The daughter's sons lived in Batala. Parmeshri Das could not remember Bam. Remarks similar to those in Achhra Ram's case apply.

5. Hira Nand's daughter's son lived at Sultanpur. The nephew is said by some of the witnesses to have succeeded, but the instance is otherwise unascertained. The statement of Gopi that one nephew, Balmokand, did not succeed, throws further doubt upon the instance.

6. Mussammat Rano's case is also doubtful, as Gopi represents himself as succeeding to a paternal grandson's share.

7. Hira is mentioned by Parmeshri Das. The evidence that there was any daughter's son is vague. The case appears to be of Lahore.

8. Dyal's nephew succeeded, according to Parmeshri Das, but that witness could name no daughter's son. Devi Ditta stated that a grandson succeeded.

Plaintiff's witnesses mentioned two instances of undisputed wills in favour of daughters.

We do not consider the above-mentioned doubtful and ill ascertained instances sufficient to prove a custom amongst Tewari Brahmins of the city of Amritsar that a daughter's son is excluded in succession by a nephew. *Prabh Dial v. Devi Dyal* ⁽¹⁾, and *Mohan Lal v. Devi Das* ⁽²⁾, cited here for plaintiff are not in point. The families were Brahmins of sects other than Tewari and were residing in villages. In both cases custom was found, and in the latter case the family was agriculturist. In *Chandika Bakhsh v. Muna Kunwar* ⁽³⁾, a case of migrated Brahmins was before their Lordships of the Privy Council, and it was laid down that a family custom in derogation of the ordinary law cannot be supported on so slender a foundation as four instances of comparatively modern date, and the case is directly applicable to the present, the parties having carried their rules of Hindu Law with them from Gujrat to Oudh.

In *Mussammat Mulo v. Phulo Missar* ⁽⁴⁾, it was found that among Athbans Brahmins of Amritsar city no custom was established of the exclusion of daughters by near agnates, and it was there said that it was clear that among town Hindus of the upper classes disconnected with agriculture there is no general or well

⁽¹⁾ 116 P. R., 1893.

⁽³⁾ I. L. R., XXIV All., 273.

⁽²⁾ 43 P. R., 1890.

⁽⁴⁾ 108 P. R., 1888.

recognized custom by which daughters and daughters' sons are excluded.

We find the custom set up not proved to obtain amongst Tewari Brahmins of Amritsar city.

We accept the appeal and reversing the decree appealed we dismiss plaintiff's claim with costs throughout.

Appeal allowed.

No. 31.

Before Mr. Justice Chatterji and Mr. Justice Harris.

APPELLATE SIDE.

NATHA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

HURMAT AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 44 of 1900.

Custom—Inheritance—Pagvand and chundavand—Naru Rajputs of Hoshiarpur—Whole and half blood.

In a suit the parties to which were Naru Rajputs of tahsil Hoshiarpur, where the ancestral land had been divided on the *chundavand* and not on the *pagvand* principle, held that the agnates of the whole blood had preference over the agnates of the half blood.

Jahangir v. Ghulam Kadir ⁽¹⁾, *Gholam Muhammad v. Muhammad Bakhsh* ⁽²⁾, *Mohar Singh v. Kala Singh* ⁽³⁾, *Sohel Singh v. Uttam Singh* ⁽⁴⁾, *Pir Bakhsh v. Karim Bakhsh* ⁽⁵⁾, and *Ahmad Shah v. Mussamat Talia Bibi* ⁽⁶⁾, referred to.

Further appeal from the decree of S. Clifford, Esquire, Divisional Judge, Hoshiarpur Division, dated 19th October 1899.

Madan Gopal, for appellants.

Muhammad Shaffi, for respondents.

The facts of the case are fully stated in the judgment of the Court delivered by—

29th Jany. 1903.

CHATTERJI, J.—The parties in this case are Naru Rajputs of *tahsil* and District Hoshiarpur. They are all descended from one Amanat Khan, and their genealogical tree as propounded by the real defendants, Ghulam Ghaus, &c., and accepted as correct by the Divisional Judge, is as follows:—

⁽¹⁾ 45 P. R., 1890.

⁽²⁾ 4 P. R., 1891, F. B.

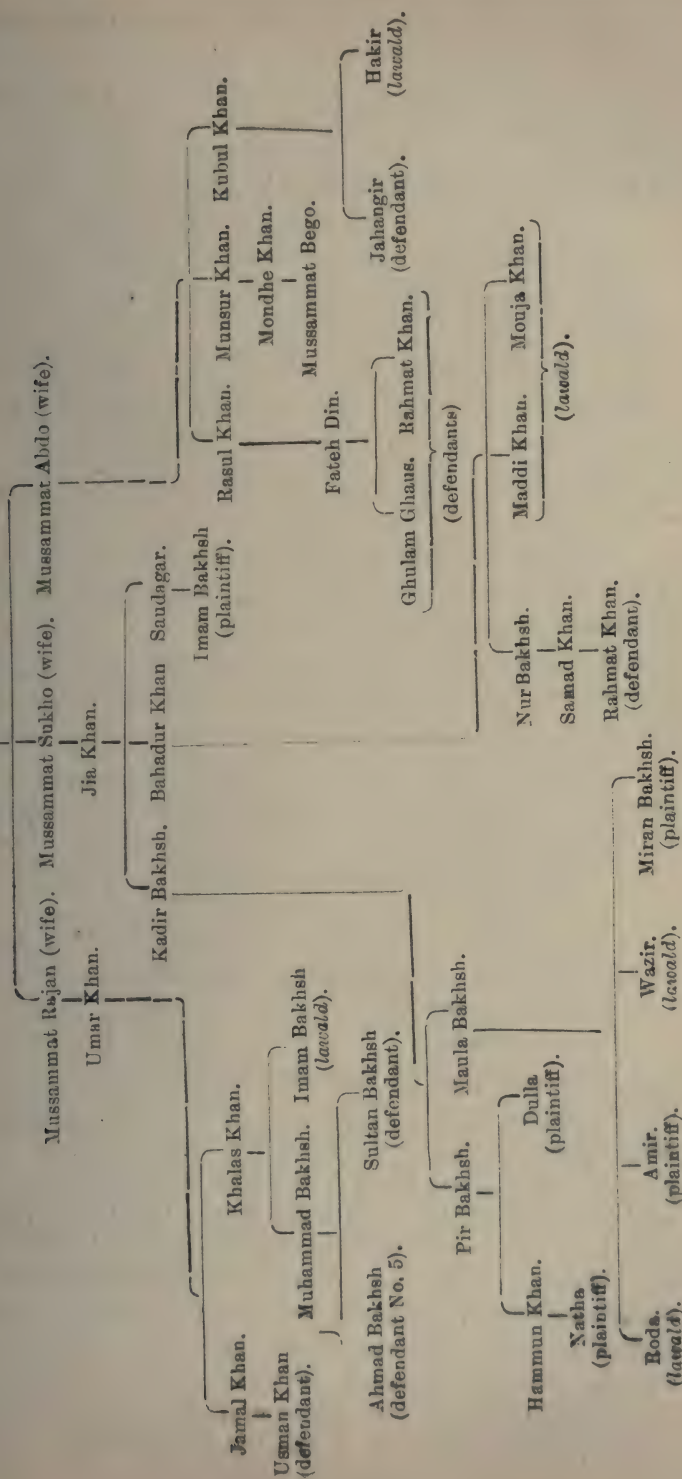
⁽³⁾ 32 P. R., 1891.

⁽⁴⁾ 48 P. R., 1891.

⁽⁵⁾ 22 P. R., 1895.

⁽⁶⁾ 34 P. R., 1900.

AMANAT KHAN.



The suit is about land left by Mussammat Bego, widow of Mondhe Khan. The plaintiffs contend that Amanat Khan had only two wives and had no wife named Mussammat Rajan, while defendants assert that he had three wives, of whom Mussammat Rajan was one. Usman Khan, Ahmad Bakhsh and Sultan Bakhsh, defendants, being descended from her.

1. The points for determination in this appeal are whether Amanat Khan had only two wives, Mussammat Sukho and Mussammat Abdo, or had a third wife, Mussammat Rajan, who was the ancestress of Usman Khan, &c.

2. Whether the division of Amanat Khan's property among his sons took place according to the rule of *chundavand* or *pagvand*, and whether agnates of the whole and half blood are entitled to succeed equally to Mussammat Bego's land, or the former exclude the latter.

The settlement pedigree gives only two wives of Amanat Khan, and shows the parties relationship as contended for by the plaintiffs, but the Divisional Judge holds it to be erroneous and that propounded by the defendants, Ghulam Ghaus, Rahmat Khan and Jahangir to be established by the evidence and the probabilities.

Mussammat Bego died in July 1895 and Usman Khan, defendant, who is a lambardar, claimed that her land should be divided into three equal shares, *viz.* :—

Descendants of Rasul Khan	1 share
Ditto	Kubul Khan	...	1 ,,
Ditto	Umar Khan, <i>i.e.</i> , himself,		
	Ahmad Bakhsh and Sultan		
Bakhsh	1 ,,

he then apparently accepted the settlement pedigree table. Plaintiffs claimed an equal share, alleging that division of Amanat Khan's property had previously taken place according to the *pagvand* rule, and that hence there was no difference between the whole and the half blood. This was denied by all the present defendants who asserted the preferential right of relations of the whole blood, as the previous division had been according to the rule of *chundavand*. Mutation was at first sanctioned according to the shares stated by Usman Khan, but both the plaintiffs and the other defendants appealed to the Collector who returned the case to the Tahsildar for further inquiry. In the course of that inquiry plaintiffs Natha, Dulla and Imam Bakhsh made a joint

statement on 4th March 1896, admitting the genealogical tree propounded by Ghulam Ghaus, &c., and accepted by the Divisional Judge to be correct, and that at the previous division of the family property among the descendants of Amanat Khan the *chundavand* principle had been followed, but claiming a share if Usman Khan, &c., got one. Usman Khan, Ahmad Bakhsh and Sultan Bakhsh ultimately came to an amicable arrangement with Ghulam Ghaus, &c., under which they took only thirty *kanals* of land in all without share of *shamilat* and gave up all claim to the rest of Mussammatt Bego's property. The Naib Tahsildar sanctioned mutation accordingly on 6th September 1896 and referred plaintiffs, descendants of Mussammatt Sukho, to a regular suit, which they have now brought. The real contest is between the plaintiffs and Ghulam Ghaus, Rahmat Khan and Jahangir, defendants. Usman, &c., are interested only to the extent of the thirty *kanals* which they got from the other defendants.

The oral evidence is of little value. None of the three witnesses produced by the defendants is of sufficient age to depose from his personal knowledge about the wives of Amanat Khan, or the division of his property among his descendants. In *Jahangir Khan v. Ghulam Kadir* ⁽¹⁾, it was held that among the Naru Rajputs of the Hoshiarpur district the rule of *pagvand* prevails, but this was prior to adjustment of the question of *onus* by the Full Bench decision in *Ghulam Muhammad v. Muhammad Bakhsh* ⁽²⁾. The oral evidence leaves it uncertain whether the *pagvand* or the *chundavand* custom is followed by the Narus of Hoshiarpur.

Nevertheless we think that the Divisional Judge has, on good grounds, (1) accepted as correct the pedigree table propounded by the real defendants, and (2) held that the descendants of Amanat Khan have been holding property on the principle of groups according to wives. The reasons in support of his view are as follows:—

(1) The total land held by the descendants of Umar Khan is, according to the figures given by the *patwari*, about 880 *kanals*, or, deducting 30 *kanals* acquired at the mutation proceedings on Mussammatt Bego's death and 44 *kanals* which is a separate *muafi* held by them, about 805 *kanals*.

Ghulam Ghaus, &c., hold about 714 *kanals*, while plaintiffs have about 637 *kanals*. Although the quantities of land held by the three groups are not exactly equal, they are more in accord

(1) 45 P. R., 1890.

(2) 4 P. R., 1891 F. B.

with the principle of a *chundavand* than a *pagvand* distribution. For under the latter Umar Khan's descendants ought only to hold one-fifth of the whole or about 427 *kanais*. Again had Umar Khan been the son of Mussammat Abdo all the defendants, *i.e.*, Ghulam Ghaus, &c., and Usman Khan and his cousins would have together held about a thousand *kanals* on the *chundavand* principle, while they hold more than fifteen hundred. Thus the quantities of land held by the three groups furnish a strong argument for presuming (a) that Amanat Khan had three wives, (b) that the two sets of defendants are descended from different mothers, and that the original partition in the family was *per stirpes* according to wives and not *per capita* according to sons.

(2) Another reason which appears to be a most cogent one, though not noticed by the Divisional Judge, is that in the settlement record the descendants of Amanat Khan are shown in groups holding land separately from each other, but jointly among members of each group, and this grouping is in accordance with descent from the three wives of Amanat Khan shown in defendants' pedigree table. For instance, plaintiffs and the other descendants of Mussammat Sukho hold land jointly amongst themselves but separately from the others. The same is true of Usman Khan, Ahmad Bakhsh and Sultan Bakhsh alleged by the other defendants to be descended from Mussammat Rajan and of those defendants themselves. This is a most remarkable fact which tells very strongly in favour of the contention of the real defendants and of which there is no explanation.

(3) It is also shown that the three groups have a little land in common in which their shares as such groups are recorded as equal. In *khewat* 23 of the last settlement and 26 of the *jama-bandi* of 1896-97 the three groups are shown as having one-third each. In settlement *khewat* 36 and *jama-bandi* 44 there are two outsiders who are co-sharers, and the share of each of the three groups is one-fifth. This fact also indicates that the ancestral property was partitioned according to groups formed by the descendants of each wife, and that the share of each group was equal or approximately so.

(4). Lastly, there is the statement of Natha and his co-plaintiffs before the Naib Tahsildar on 4th March 1896 in the mutation proceedings in which they admitted the contentions of Ghulam Ghaus, Rahmat Khan and Jahangir to be correct as regards the pedigree table and the previous division of Amanat Khan's land, and also that they had no claim to Mussammat Bego's

land unless Usman Khan, &c., descendants of Mussammat Rajan, were allowed a share. It is argued that plaintiffs were not examined in this case with reference to the former statement, and that the attested copy filed of that statement does not prove that it was made. But plaintiffs are parties to the suit and not witnesses, and the previous deposition is referred to only as an admission, and having regard to Sections 65 (c), 74, 79 and 80 of the Evidence Act, we consider the production of the attested copy sufficient to prove the former statement.

The above evidence, in our opinion, makes it abundantly clear that the property of Amanat Khan has been held by his descendants in three groups, that presumably these groups got the property in this manner at the original partition, and that they are formed in each case by the descendants of the different wives of Amanat Khan. Thus on the principle laid down in the Full Bench case of *Ghulam Muhammad v. Muhammad Bakhsh* ⁽¹⁾, the real defendants as the agnates of the whole blood have preference over plaintiffs agnates of the half blood. In any case the surviving members of each group have, as regards property left by a member of that group, a superior right of succession to persons belonging to other groups, *Mohar Singh v. Kala Singh* ⁽²⁾, *Sohel Singh v. Uttam Singh* ⁽³⁾, *Pir Bakhsh v. Karim Bakhsh* ⁽⁴⁾, and *Ahmad Shah v. Mussammat Talia Bibi* ⁽⁵⁾.

We uphold the decree of the Divisional Judge and dismiss this appeal with costs.

Appeal dismissed.

No. 32.

Before Mr. Justice Reid.

BAGGA MAL,—(DEFENDANT).—APPELLANT,

Versus

MOTI RAM AND ANOTHER.—(PLAINTIFFS).—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 725 of 1901.

Mortgage—Effect of payment of prior mortgage by subsequent incumbrancer as against intermediate charge.

K, N and G were joint owners of certain land, K's share being half and the share of N and G being half. In 1887 they mortgaged half of their holding to M. In 1889 K created a further charge in favour of M

⁽¹⁾ 4 P. R., 1891.

⁽²⁾ 48 P. R., 1891.

⁽³⁾ 32 P. R., 1891.

⁽⁴⁾ 22 P. R., 1895.

⁽⁵⁾ 34 P. R., 1900.

on his own quarter share already under mortgage. In 1900 M obtained a decree against K, N and G for possession of the land mortgaged on the condition that the land would be released on payment of Rs. 650. K mortgaged a portion of his property for Rs. 700 to B who deposited Rs. 650 in the executing Court to the credit of M, who took the money out of Court without prejudice to his right under the second mortgage. Subsequently K having failed to meet his liabilities under the second mortgage of 1889, M instituted the present suit for possession and impleaded B as a co-defendant and claimed priority over B's mortgage which was of a subsequent date. B pleaded that as he had paid off the first mortgage he could now use it as a shield against all the subsequent incumbrances.

Held, that as B had notice of the existence of the prior and mesne mortgages before the execution of his mortgage, no equities arose in his favor, and the result of the redemption of the prior mortgage being that his mortgage was subject only to the mesne mortgage, he was not entitled to use the prior mortgage as a shield against the mesne mortgage.

Gokal Das Gopal Das v. Puranmal ⁽¹⁾, *Sheikh Mehr Ali v. Mussammal Azim Bibi* ⁽²⁾, *Ghanaya v. Pandit Chhajju Ram* ⁽³⁾, *Jhabar v. Singh Ram* ⁽⁴⁾, *Mohesh Lal v. Mahant Bawan Das* ⁽⁵⁾, *In re Harris* ⁽⁶⁾, and *In re Wrexham, &c., Railway* ⁽⁷⁾, referred to.

Further appeal from the decree of Captain G. C. Beadon, Divisional Judge, Jullundur Division, dated 16th May 1901.

Madan Gopal, for appellant.

Lal Chand, for respondents.

The Judgment of the learned Judge was as follows:—

17th Jany. 1903.

REID, J.—Kahn Singh, Narain and Gujar were joint owners of *khata* No. 30, comprising 255 *kanals* 17 *marlas*, Kahan's share being half and Narain's and Gujar's share being half. In 1887 the three mortgaged half the *khata* to Moti Ram, respondent, for Rs. 600, without possession, unless default in payment of interest was made.

On the 20th January 1900 Moti Ram obtained a decree against the mortgagors for possession of the land mortgaged. The mortgagors confessed judgment, and it was agreed that the land would be released on payment of Rs. 650. On the 13th July 1900 the executing Court ordered that Rs. 650 be deposited, and the same day the office of the Court reported that that sum had been deposited by Bagga Mal, appellant, to Moti Ram's credit. On the 16th July the Court ordered that notice of the deposit

⁽¹⁾ *I. L. R.*, X *Calc.*, 1035, P. C.

⁽²⁾ 59 P. R., 1882.

⁽³⁾ 38 P. R., 1894.

⁽⁴⁾ 67 P. R., 1899.

⁽⁵⁾ *I. L. R.*, IX *Calc.*, 961, P. C.

⁽⁶⁾ *L. R.*, XIX *Ex.*, 253.

⁽⁷⁾ *L. R.*, I *Ch.*, (1899), 440.

should issue to the decree-holder, who took the Rs. 650 out of Court on the 17th August 1900, without prejudice to his rights under the second mortgage.

On the 5th November 1898 Moti Ram obtained an *ex-parte* decree against Kahn Singh only on bonds, &c., for Rs. 712 and costs, and on the 22nd March 1899 Kahan Singh executed a mortgage giving Moti Ram a further charge on the quarter share of the *khata* already mortgaged by him, providing that on failure to pay Rs. 23-4-0 per annum, fixed as interest, Moti Ram was to have possession. The present suit instituted on the 29th August 1900 is based on default to pay this interest. Bagga Mal, who was impleaded as a co-defendant, pleaded that he had paid off the first mortgage and stood in the mortgagee's shoes in respect of that mortgage.

On the 11th July 1900 Kahan Singh mortgaged three-fourths of certain specified fields in the *khata*, aggregating 40 *kanals* 11 *marlas* to Bagga Mal for Rs. 700.

Counsel for the appellant contends that the principle of subrogation applies, and that his client is entitled to keep alive the prior mortgage, which he redeemed, as a shield against the mesne mortgage, payment having been made by him after the puisne mortgage in his favour was effected.

The rule stated in Ghose on mortgages, Edition 3, page 397, is that generally the right to a cession or assignment of the security can be claimed only by a person who, though not personally bound to discharge a debt, finds himself obliged to do so for his own protection.

Counsel for the appellant does not contend that the funds from which the prior mortgage was redeemed were not out of the consideration for his client's, the mesne mortgage, or that the appellant had any interest in the property mortgaged to Moti Ram until the execution of the deed in his favour.

Gokal Das Gopal Das v. Paramul ⁽¹⁾, *Sheikh Mehr Ali v. Mussunmat Azim Bibi* ⁽²⁾, *Ghanaya v. Pandit Ohhajja Ram* ⁽³⁾, and *Jhakar v. Singh Ram* ⁽⁴⁾, cited by counsel for the appellant, are distinguishable from the present case. In the Privy Council case the purchaser of property subject to mortgages to two different parties redeemed the prior mortgage.

(1) *I. L. R.*, Calcutta, (P. C.), 1035.

(2) 59 P. R. 1882.

(3) 38 P. R. 1894.

(4) 67 P. R. 1899.

In the 1882 case the plaintiff paid off a mortgage for the mortgagor-defendant, the mortgage deed was transferred to him and he was allowed to retain possession of it. It was held that he acquired the mortgagee's rights against the mortgagor.

In the 1894 case the prior mortgage was to Gandhi Rai for Rs. 300, the mesne mortgage was to Sobha Ram for Rs. 300, and the puisne mortgage was to Ghanaya for Rs. 349, with a condition that the mortgagee should pay off Gandhi's mortgage and take possession from him after redemption.

Mohesh Lal v. Mahant Bawan Dos ⁽¹⁾, was distinguished, on the ground that in it there was no intermediate mortgage and the purchaser merely paid off the mortgage.

The facts of the 1899 case were similar to those of the *X* Cal. case.

Counsel for the appellant also cited passages from Ghose on Mortgages, Ed. 3, pages 397, 398, 401, 415, and *Ex parte Harris* ⁽²⁾, for the proposition that his client was an equitable transferee of the prior mortgagee and was entitled to stand in the place of the prior mortgagee even in the absence of a formal transfer.

In *in re Wrenham, &c., Railway* ⁽³⁾, Vaughan Williams, L. J., said: "I very much doubt whether either at law or in equity, a man who pays off a debt at the request of another is necessarily to be treated as assignee of the debt; but a very little evidence will be sufficient to establish that, *as between himself and the person at whose request he has paid off the debt*, it was intended that he should be treated as the transferee of the securities, if such there be, in the hands of the creditor." The words in italics are important and the rule laid down is in accordance with the 1882 case.

In proceedings in execution of the decree obtained on the 1887 mortgage Moti Ram objected to redemption before his second mortgage was redeemed, and both parties asserted that the question of their respective rights under the second mortgage should be decided by subsequent suit.

No authority for the proposition, that, where two mortgages have been executed in favour of one mortgagee, the mortgagor may redeem the prior mortgage and use it as a shield against the puisne mortgage, has been cited. The result of the redemption of the prior mortgage was that the appellant's mortgage was subject

⁽¹⁾ *I. L. R.*, IX Cal., 961. *P. C.* ⁽²⁾ *L. R.*, XIX Eq., 253.

⁽³⁾ *L. R.*, I Ch., (1899) 440.

only to the mesne mortgage, if it be granted, for the sake of argument, that the properties mortgaged are, to any extent, identical, and the appellant is in the position of his mortgagor in respect of the mesne mortgage.

I see no reason to doubt that the appellant had notice of the existence of the prior and mesne mortgages before the execution of his mortgage, and no equities arise in his favour.

The fourth ground taken in appeal was not pressed, the mortgages and causes of action being admittedly separate, and the third ground has not been pressed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 33.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Anderson.

AHMAD SHAH AND OTHERS, —(DEFENDANTS),—
APPELLANTS,

Ver: sus

} APPELLATE SIDE.

KHUDA BAKHSH AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 1287 of 1898.

Alluvion and diluvion—Rights of adna maliks in submerged land—Custom—Mauza Muradpur, tahsil Alipur, Muzaffargarh District—Wajib-ul-arz—Haq Juri.

The plaintiffs, who were *adna maliks* in mauza Muradpur, tahsil Alipur, in the Muzaffargarh District, sued for a declaration of *adna malikiyat* rights in certain land which had been submerged by river action, which, on its reappearance in accordance with a provision of the *Wajib-ul-arz*, had been recorded as the sole property of the defendants. The provision of the *Wajib-ul-arz* was to the effect: "that in this village there are two kinds of property, *ala* and *adna*. If the land belonging to any *adna malik* is washed away, at the time of its being thrown up it becomes the property of *ala malik*. The *adna maliks* retain no right in the land. The *adna maliks* after paying *haq Juri* to the *ala maliks* will be entitled to get possession. Without paying *haq Juri* they will have no right. If the *ala maliks* intentionally refuse to take *Juri* the *adna maliks* are not entitled to take possession. The arrangement as to *Juri* is to depend upon the value of the land and the status of the *adna malik*. But it shall not be less than Re. 1 per *bigha* or more than Rs. 2 per *bigha*. The *adna maliks* shall have the same power whether the whole or a portion of any wells are carried off."

Held, that as the payment of *haq Juri* or an institution fee for the recovery of land cannot be considered opposed to the principles founded on universal law and justice, it was for the *adna maliks* to rebut the presumption in favour of the correctness of the entries of the record of custom and to prove that they were not bound to pay it.

Held, on the evidence that the plaintiffs have failed to rebut the entry in question or to prove that they were entitled to the land without payment of *haq Juri*.

Ghulam Mohay-ud-din v. Fair Bikksh (1), and Mubarik Shah v. Abdulla (2), referred to.

Further appeal from the decree of J. G. M. Rennie, Esquire, Divisional Judge, Mooltan Division, dated 12th July 1898.

Lachmi Narain, for appellants.

K. C. Chatterji, for respondents.

The judgment of the Court was delivered by—

23rd Jan'y. 1903.

CLARK, C. J.—The plaintiffs are *adna maliks* and defendants *ala maliks* in the village of Muradpur, *tahsil* Alipur, Muzaffargarh District, and the suit is for a declaration of *adna malikiyat* rights in certain land which has been recently thrown up by the Chenab.

Before it was washed away it was recorded as the property of plaintiffs as *adna maliks* and the defendants as *ala maliks*, but since it has been thrown up, in accordance with a provision of the *Wajib-ul-arz*, it has been recorded as the sole property of the defendants.

The *Wajib-ul-arz* runs as follows:—

“In this village there are two kinds of property, *ala* and
“*adna*. If the land belonging to any *adna malik* is washed away
“at the time of its being thrown up it becomes the property of
“*ala malik*. The *adna maliks* retain no right in the land. The
“*adna maliks*, after paying *haq Juri* to the *ala maliks*, will be
“entitled to get possession, without paying *haq Juri* they will
“have no right. If the *ala maliks* intentionally refuse to take
“*Juri* the *adna maliks* are not entitled to take possession. The
“arrangement as to *Juri* is to depend upon the value of the land
“and the status of the *adna malik*. But it shall not be less
“than Re. 1 per *bigha* or more than Rs. 2 per *bigha*. The *ala*
“*maliks* shall have the same powers whether the whole or a
“portion of wells are carried off.”

(1) 97 P. R., 1902.

(2) 125 P. R., 1889.

This Court by its order of 21st November 1901 has decided that the plaintiffs have the right to be declared *adna maliks* of the land in suit, and the only question remaining for decision is whether the right of plaintiffs to be declared *adna maliks* of the land in suit is dependent on the payment to defendant of *haq Juri*, and, if so, what is the amount of *haq Juri* so payable.

The question of the rights of *ala* and *adna maliks* in the Alipur *tahsil* is discussed on page 92 of the Settlement Report, and it appears that their respective rights vary in different villages, and they were considered with regard to each village. Great weight must therefore be attached to the entry in the *Wajib-ul-arz* and the presumption in favour of the correctness of the entries therein contained must be given its due effect.

Ghulam Mohay-ul-din v. Faiz Bakhsh ⁽¹⁾ asserted the right of the *adna maliks* to recover thier land, and disregarded the entry in the *Wajib-ul-arz* against them as opposed to the principles founded on universal law and justice. In that case the question of *haq Juri* did not arise, and it is not necessary to agree with or dissent from that judgment.

The payment of *haq Juri* or an institution fee for the recovery of land cannot be considered opposed to those principles.

In the case *Diwan Muhammad Ghaus v. Maji*, of the Muzaffargarh *tahsil*, decided by Mr. O'Brien on 11th May 1877, he says in his judgment after noting the issues in the case:—

“The evidence of the custom prevailing is very conflicting, and it cannot be said that there is any established custom on the bank of the Chenab, from which it might be inferred what is the custom in this particular village. In some villages—and it is to be remarked that the villages in which this custom prevails are those in which the superior proprietors are strong—newly formed land goes absolutely to the superior proprietors to dispose of as they see fit. They can dispose of the land even if it belonged to others before it was cut away, a *fortiore* land which was not known to have belonged to any one before it was cut away belongs to them when reformed. An instance of this is *Bet Panahin* of which Fazil Muhammad, witness, is *lambardar*, and his evidence is true as regards his own village, but false as regards others and *Chak Dada*. In others land once cut away and then reformed goes to the inferior proprietor whose

(1) 97 P. R., 1902.

"it was formerly, but he has to pay *Juri* before he can cultivate
"it to the superior proprietor."

In the appeal from that case Sir J. B. Lyall says: "From
"my experience in the Dera Ismail Khan, Dera Ghazi Khan,
"Muzaftargurh and Mooltan Districts I feel competent to say
"that the normal incidents of the tenure are as follows
" If the land was originally held in *adna malikiyat*, but was
"swept away by river from which it after an interval re-emerg-
"ed, this gives such old holder or his heirs no special claim. In
"fact in villages where the tenure is of this normal type the
"proprietary rights of the *chikdars* or *alna maliks* (not them-
"selves of the *zaminlari* family) are confined to their res-
"pective holdings for which they have paid *Juri*, and do not
"survive the destruction of the land by the river even in respect
"to such holdings. The above is the normal and apparently the
"ancient type of the tenure, but in many villages by usage or
"agreement or ruling at first settlements the *adna maliks* have come
"to have some further rights In a
"certain number of estates also the rule has come to be that an
"*adna malik*, though not entitled to break up waste generally
"without leave or only entitled to do so as a tenant, yet has a right
"to recover possession as *adna malik* of land re-forming on the
"site of land originally held by him in *adna malikiyat* generally,
"however he has to pay *Juri* again, but sometimes I think he
"has not. This right of recovering the *adna malikiyat* of land re-
"forming without consent of the *ala malik*, was, I think, conceded
"in Dera Ismail Khan only where the original *adna malikiyat*
"was of a strong kind such as is acquired by sinking a well or
"making an embankment in the *Daman* country as opposed to
"the weaker kind acquired by mere '*Butemasi*' of land in the
"river bed The abstract of the
"special enquiry which it gives shows that in a majority of
"the villages inquired about the *alna maliks*' prior claim to land
"re-forming on the site of his old holding survives (though he
"has to pay *Juri* again), but it does not show that the *Zamin-*
"*dar* has no right to occupy waste himself as *alna* as well as
"*ala malik*. On the contrary, it shows that in many villages the
"tenure is that which I have described as the normal type; and
"that in all or nearly all the rest the *adna malik* can only
"claim to break up and hold as *adna malik* waste land which
"can be shown to have reformed on the site of land so held by
"him before, other unpossessed waste land belongs absolutely
"to the *Zamindar*."

In the end a decree was given to the *adna maliks* for their *adna malkiyat* conditional on their paying the *ala maliks haq Juri* when they might demand it, the *Juri* on the cultivated land being demandable at once, that on the uncultivated land when the land was brought under cultivation.

On a consideration of the above circumstances we think it lay upon the *adna maliks* to show that they were not bound to pay *haq Juri*. On a consideration of their evidence we find that the instances quoted by them are all quite recent, none of them prior to 1893, and some of them subsequent to the institution of this suit in 1897, this suit being apparently a test suit.

With reference to the case quoted in their favour decided on 29th April 1875 and relating to *mauza Hajipur* in the *Muzaffargarh tahsil*, we have only to say that the rights of each village must be considered independently, and it appears from the decision in that case that the reason the *adna maliks* were not required to pay *haq Juri* was because they had in the first instance obtained the land, not by paying *haq Juri*, but by purchase.

We hold that the *adna maliks* have failed to prove that they are entitled to the land without payment of *haq Juri*. *Mubarik Shah v. Abdullah* ⁽¹⁾, a case of the Dera Ismail Khan district, is a case in which the obligation of the *adna maliks* to pay *haq Juri* was recognized.

With reference to the amount of *haq Juri* which plaintiffs should pay, defendants have not shown that they are entitled to more than the minimum entered in the *Wajib-ul-arz*, namely, Re. 1 per *bigha*.

We accept the appeal so far as to direct that plaintiffs, before taking possession of the land claimed, shall pay *haq Juri* Re. 1 per *bigha* to defendants.

Parties will bear their own costs of this appeal.

Appeal allowed.

⁽¹⁾ 125 P. R., 1880.

No. 34.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Anderson.

APPELLATE SIDE. {

RALLA AND OTHERS,—(DEFENDANTS),—APPELLANTS,
Versus
DAYAL AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 949 of 1899.

Custom—Pre-emption—Sale to a stranger—Acquisition of pre-emptor with superior right—Suit by a pre-emptor with inferior right against the stranger—Waiver of right—Acquiescence.

Where a pre-emptor with superior rights agreed with a vendee, who was a stranger, that in consideration of his receiving a portion of the property sold he would waive his objections to the sale, *held*, that as the transaction was equivalent to that of taking over only a portion of the original bargain or associating a stranger in the purchase, it was not permissible by law and could not therefore defeat the rights of other pre-emptors.

Ramsukh Das v. Fazal-ud-din ⁽¹⁾, and *Jiwan Singh v. Sher Singh* ⁽²⁾, referred to.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Jullundur Division, dated 2nd June 1899.

Sohan Lal, for appellants.

Gokal Chand, for respondents.

The judgment of the Court was delivered by—

19th Dec. 1902.

CLARK, C. J.—On 6th May 1896, Gajju sold 56 *kanals* of land to Sawan for Rs. 96½.

The sons of Kharku, as pre-emptors and reversioners of Gajju, entered into an agreement with Sawan on 26th June 1896, by which, in consideration of Sawan giving them 15 *kanals* of the land sold, they confirmed the sale of the remaining 41 *kanals* to Sawan. This agreement was registered.

Plaintiff instituted the suit for pre-emption on 6th May 1899, and has obtained a decree for pre-emption from which the sons of Kharku are now appealing.

It is urged on their behalf that the agreement of 26th June 1896 was equivalent to a purchase by the sons of Kharku of the whole of the land sold, and a re-sale by them to Sawan of 41

(1) 19 P. R., 1898.

(2) 10 P. R., 1899.

kanals, and that plaintiffs claim for pre-emption lies only as regards the 41 *kanals* sold, and not as regards the 56 *kanals* originally sold to Sawan.

Ramankh Das v. Fazal-ud-din (¹), and *Jiwan Singh v. Sher Singh* (²), are quoted in support of this view, but they are not in fact applicable, for the question here is whether the agreement of 26th June 1896 was in fact an exercise of the right of pre-emption as regards the whole 56 *kanals*, and a re-sale of the 41 *kanals*.

In my opinion it was not, but was simply a waiver or sale of the pre-emption and reversionary rights of the sons of Kharku for the consideration of 15 *kanals*.

It would not have made any essential difference if the consideration had been a sum of money instead of 15 *kanals* of land.

It is not competent for a pre-emptor with superior rights to exclude a pre-emptor with inferior rights of pre-emption by entering into an agreement with a stranger vendee to sell or give up his right of pre-emption.

The transaction is in itself a perfectly lawful one as between that pre-emptor and the vendee, but it does not defeat the rights of other pre-emptors.

Looked at from other points of view, the transaction was equivalent to the sons of Kharku taking over a portion only of Sawan's bargain, or to the sons of Kharku associating a stranger with themselves in the purchase of the land, and neither of these courses are permissible according to the decision of this Court.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

Full Bench.

No. 35.

*Before Mr. Justice Clark, Chief Judge, Mr. Justice Reid
and Mr. Justice Harris.*

DAULA,—(PLAINTIFF),—APPELLANT,

Versus

GONDA,—(DEFENDANT),—RESPONDENT.

Civil Reference No. 12 of 1902.

} REFERENCE SIDE.

Stamp Act, 1899, Section 2 (5) (b)—Acknowledgment of a debt—Bond.

Held, that an acknowledgment of a debt signed by the executants and attested by a witness by which the plaintiff was to receive the balance

(¹) 19 P. R., 1898.

(²) 10 P. R., 1902.

from the executants was a bond within the meaning of Section 2, (5) (b) of the Indian Stamp Act, 1899, as the executants had obliged themselves thereby to pay the money.

*Case referred by Lalla Kesho Das, District Judge, Ludhiana,
on 17th May 1902.*

The judgment of the learned Judges of the Full Bench was delivered by—

22nd Nov. 1902.

CLARK, C. J.—This is a reference under Section 60 of the Indian Stamp Act No. II of 1899.

Plaintiff sued for Rs. 1,171 due on a balance of account.

The wording of the balance is "*Lekha paya Ganda beta Sujana da, Suhela beta Sujana da, Miti Jeth sudi 13 sal 1957.*"

Ticket 1 anna.

"*Rs. 948 baqi lene Ganda pason, Suhela pason, bij saikra da Re. 1, rob kari Jhaba Singh, beta Bare da, rob kari Mehtab Singh beta Sarup Singh da, Nishani Ganda di. Nishani Suhela di. (Mohar) Ro la Lambardar zubani Suhela di, Ganda di zubani.*"

The question for determination is whether this document is a bond.

The portion of the definition of a bond applicable, Section 2 (5) (b) is—

Bond includes "any instrument attested by a witness and "not payable to order or bearer, whereby a person obliges himself to pay money to another."

The document is attested and the question is whether thereby Ganda and Sohela oblige themselves to pay money to plaintiff.

In *Ladhu Shah v. Fazl Dad* ⁽¹⁾, the following entry:—
"Balance Rs. 323. One rupee per cent. per month has been fixed as interest on it. Besides this there is no other account between us up to 18 Assoo (signed) Fazl Dad" was held to contain a promise to pay the balance of Rs. 323 with interest.

In *Chimba Ram v. The Crown* ⁽²⁾, Revenue, the following entry: "Rs. 4-15-4 balance payable by Roda Haral struck on 16 Magh 1937 by Ram Kapur at the dictation of both parties, account made up at Thathu Shashu in Haral Mark of Roda Haral, signature of Diyal Mahra, at the request of Roda Haral" was held not to be a bond. It being held that, "the law may infer from this a promise to pay, but there is nothing

⁽¹⁾ 72 P. R., 1879.

⁽²⁾ 4 P. R., 1885.

“in such an entry to show that it was the intention to create a fresh obligation.”

In *Lakhmibai v. Ganesh Raghunath* (1), the following entry: “This day rupees two hundred and forty-one I received. The interest thereon is by agreement fixed to be at the rate of Rs 3-4 per cent. per month. This is the account in respect of the same,” was held to be an agreement.

Every instrument must be considered on its own merits. The particular instrument we are considering says, ‘*baqi lena Gandapason, Sohela pason*’. “*Lena*” and “*dena*” are complementary to one another, and when Ganda and Sohela signed this instrument by which plaintiff was to take the balance from them, they must be held to have undertaken to pay the balance, and to have therefore obliged themselves thereby to pay the money.

It is true as stated in *Hira Lal Sircar v. Queen-Empress* (2); that, “no document can be a bond within the definition unless it is one which itself creates an obligation to pay money, as is the case with these documents which are known as bonds, according to the common use of the word, but is not the case with acknowledgments of advances, or of the purchase and receipt of goods, the obligation to pay for which is not created by the instrument, but arises from the promises to repay advances, and to pay for goods, which the law always implies when money is borrowed or goods are purchased.” We hold, then, that Ganda and Sohela in this instrument obliged themselves to pay money to plaintiff, and that the instrument is a bond and should be stamped accordingly.

No. 36.

Before Mr. Justice Anderson and Mr. Justice Robertson.

MOSSAMMAT JAS KAUR,—(DEFENDANT), — PETITIONER,

Versus

BHAI MAHTAB SINGH,—(PLAINTIFF), —RESPONDENT.

} REVISION SIDE.

Civil Revision No. 1741 of 1901.

Civil Procedure Code, 1882, Section 108—Ex-parte decree—Death of judgment-debtor—Application by legal representative of the judgment-debtor to have the ex-parte decree set aside.

Held, that where a defendant against whom a decree has been passed ex-parte, dies, his legal representative is competent to apply under Section 108, Civil Procedure Code, for an order to set the ex-parte decree aside.

(1) I. L. R., 25 Bom., 373.

(2) I. L. R., 22 Cal., 757.

Ganoda Prasad Roy v. Shib Narain Mukerji ⁽¹⁾, followed, and *Janki Prasad v. Sukhrani* ⁽²⁾, dissented from.

Petition for revision of the order of H. Scott Smith, Esquire, Divisional Judge, Amritsar, dated 11th June 1901.

Nanak Chand, for petitioner.

Rambhaji Datta, for respondent.

The judgment of the Court was delivered by —

5th March 1903.

ANDERSON J.—This is a petition for revision on the ground that the first Court, in declining to entertain an application to set aside an *ex-parte* order filed by the legal representative of a deceased defendant within time, failed to exercise a jurisdiction vested in it by law and was thus guilty of material irregularity. The first Court, relying on the authority of *Janki Prasad and another v. Sukhrani* ⁽²⁾, held that the representative was not competent to apply under section 108, Civil Procedure Code, for an order to set the *ex-parte* decree aside. In that case Strachey, C.J., and Knox, J., ruled that. “where the Legislature intended to “allow the legal representative of a deceased defendant to have “himself substituted for the defendant, or to allow a person claiming to be the legal representative, to apply to set aside an order, “it has expressly provided for such an application to be made by “the legal representative or the person claiming to be such. Instances of such provisions will be found in Sections 363 and 371 of the Act. There is nothing of the kind in Section 108. The result is that, in our opinion, the Code gives no right to the “legal representative of the defendant, or to any person except “the defendant himself, to apply to the Court under Section 108 “to set aside a decree passed *ex-parte*.”

On appeal to the Divisional Judge decided on 11th June 1901, he remarked that appellant's pleader had to admit this ruling was against him and no other was forthcoming, and he therefore followed it and dismissed the appeal. The High Court of Calcutta had, however, given a ruling on the same point on 31st May 1901 in the case of *Ganoda Prasad Roy v. Shib Narain Mukerji* ⁽¹⁾, which was not brought to the notice of the Courts below; in fact it was not incorporated in the Law Reports till January 1902. It was then held by Maclean, C.J., and Banerji, J., that the legal representative of a deceased defendant could apply under Section 108 for an order to set aside an *ex-parte* decree, and the ruling in *Janki Prasad v. Sukhrani* was dissented from.

⁽¹⁾ I. L. R., XXIX Cal., 33.

⁽²⁾ I. L. R., XXI All., 274.

The matter has been referred to a Division Bench for decision as to which ruling should be followed, there being no ruling of this Court exactly bearing on the subject.

After hearing counsel and considering the case, we have not much hesitation in deciding to follow the Calcutta ruling and, in so doing, we believe we are only approving what has been usually carried out in practice in this Province.

The respondent's pleader contends that the legal representative has a sufficient safeguard in the power to appeal an *ex-parte* order on the whole case as allowed by Section 540, Civil Procedure Code, but it appears to us that, by restricting the legal representative to an appeal on the whole case, he is distinctly placed at a disadvantage. It is sought to distinguish the Calcutta case from the present as, in it, the plaintiff himself had brought the representatives of the original defendant on the record and had made them defendants. Certainly this had not been done in the present case, but we do not think this makes any difference. The decree could be executed against the legal representative and, by parity of reasoning, it is only fair that the representative should enjoy the same rights and privileges as the defendant, had he survived. To be able to apply to have the *ex-parte* decree set aside is undoubtedly a privilege distinguishable from the right to appeal the *ex-parte* decree, and is only a summary procedure.

We, therefore, adopt the same view as that taken by the Calcutta High Court, that it is no unreasonable straining of language to say that in Section 108 the word 'defendant' should be taken to include legal representatives of a deceased defendant.

We allow the revision, set aside the orders of the Courts below and return the application of Mussammat Jas Kaur to be disposed of by the first Court in accordance with law. Costs in this Court and in the Divisional Court to be treated as costs in the cause to follow the event. Stamp to be refunded.

Application allowed.

No. 37.

Before Mr. Justice Chatterji and Mr. Justice Harris.

PARWA,—(PLAINTIFF),—APPELLANT,

Versus

MUSSAMMAT SANGARAN AND OTHERS,—(DEFENDANTS),
—RESPONDENTS.

Civil Appeal No. 1451 of 1898.

Jurisdiction—Res Judicata, plea of—Competency of inferior Court to enquire the jurisdiction of superior Court which passed the former decree—Consent to jurisdiction.

Held, that a decree given by a Court not competent to grant it is [a mere nullity and cannot be pleaded as a bar to a subsequent suit, the parties being entitled to ignore its existence altogether, and in such a case there is no impropriety in an inferior Court deciding in the subsequent proceeding whether the decree of the superior Court in a former suit (pleaded as a bar) was not void on the ground of defect of jurisdiction.

Nistarini Dassi v. Nando Lall Bose ⁽¹⁾, *Dabee Dutt Shikho v. Subodra Bibee* ⁽²⁾, *Eshan Chundra Sa'ooi v. Nunda Moni Dossee* ⁽³⁾, *Karmali Rahim Bhoi v. Rahim Bhoi Habib Bhoi* ⁽⁴⁾, *Mirali Rahim Bhoi v. Rahim Bhoi Habib Bhoi* ⁽⁵⁾, *Virupitshappa v. Shilappa* ⁽⁶⁾, *Haji Ahmad Hussain v. Sundar Lal* ⁽⁷⁾, *Bibi Ludli Begam v. Bebi Raji Rahia* ⁽⁸⁾, *Ledgard v. Bull* ⁽⁹⁾, and *Meenakshi Naidoo v. Subramaniam Sastri* ⁽¹⁰⁾ referred to

First appeal from the decree of Hafiz Anwar Ali, Additional District Judge, Gurgaon, dated 29th September 1898.

Ganpat Rai, for appellant.

Shelverton and Brown, for respondents.

The judgment of the Court was delivered by—

12th Jan'y. 1903.

HARRIS, J.—On the 23rd February 1894 Ganga Ram gifted his land and house property to Narain Singh his daughter's son and Beri Lal his sister's son.

Parwa Singh, the present plaintiff and son of Ganga Ram's brother, then a minor, brought a suit through his father-in-law Sandal Singh, as next friend, for cancellation of the gift and declaration of his reversionary right, and obtained a decree in the Court of the Additional District Judge. On appeal the Divisional Judge appears to have doubted whether he had jurisdiction to hear the appeal, and, noting the 30 jama jurisdictional value of

⁽¹⁾ I. L. R., XXVI Cal., 891.

⁽²⁾ 25 W. R., 449.

⁽³⁾ I. L. R., 2 Cal., 357.

⁽⁴⁾ I. L. R., XIII Bom., 187.

⁽⁵⁾ I. L. R., XV Bom., 594.

⁽⁶⁾ I. L. R., XXIII Bom., 620.

⁽⁷⁾ 80 P. R., 1893.

⁽⁸⁾ I. L. R., XIII Bom., 650.

⁽⁹⁾ I. L. R., IX All., 191.

⁽¹⁰⁾ L. R., XIV, I. A., 160.

the land in suit, directed on the 14th August 1894 an enquiry by the first Court into the value of the house property. On the 27th August 1894 a compromise was drawn up whereunder Parwa Singh, Narain Singh and Beri Lal were to receive certain specified shares in Ganga Ram's lands, no specific mention being made therein of the house property. The compromise was certified by the Additional District Judge and reported to the Divisional Judge together with the ascertained value, Rs. 1,300, of the house property. On the 10th October 1894 the Divisional Judge erroneously noted the value of the suit as Rs. 1,300, evidently forgetting that value to be only that of the house property in suit, and accepting the compromise, he passed a decree in accordance therewith. Parwa Singh, minor, was thus declared owner of a portion of the gifted land. The decree, like the compromise, is silent as to the house property.

It is clear, and it is not here disputed, that, as the jurisdictional value of that suit was over Rs. 5,000, the Divisional Judge was not competent to entertain the appeal and pass the consent decree. Ganga Ram appears to have died about the end of 1897. He left a widow Mussammat Sangaran. It seems that at the subsequent mutation proceedings the parties to the compromise did not wish to abide thereby, and that the widow desired the whole of Ganga Ram's land to be entered in Narain Singh's name. Narain Singh being found in possession of all the land mutation in his favour alone was effected on the 13th June 1898 and the objectors were referred to the Civil Courts.

Parwa Singh having attained majority instituted the present suit on the 11th July 1898, and Mussammat Sangaran, Narain Singh and Beri Lal were made defendants.

In the plaint the previous suit and compromise are ignored, and Parwa Singh sues as reversionary heir of Ganga Ram for a declaration that he will be owner of the entire estate on the death of the widow defendant, and he gives the mutation of the 13th June 1898, which he represents as the act of the widow, as the cause of action.

Narain Singh, the principal defendant, pleaded *inter alia* that the consent decree was a bar to the suit. The plaintiff replied that the Divisional Judge had no jurisdiction to pass the decree, and that consequently the decree of the first Court in plaintiff's favour subsisted. Narain Singh rejoined that the consent decree even if passed without jurisdiction was valid until set

aside by appeal or revision. The Court fixed the following preliminary issue:—Is the decision passed by the Divisional Judge, Delhi Division, on the 10th October 1894, between the parties with their consent binding on the plaintiff? Does Section 375 of the Civil Procedure Code operate as a bar to the present suit? Does the plaintiff's claim not lie so long as the judgment and the decree under reference are in force? After hearing argument the Court held, without citing any authority, that the consent decree could not be considered void until the plaintiff obtained a decree cancelling it, and that as long as the consent decree was in force and existence the suit could not proceed, no fresh cause of action having accrued to plaintiff. The suit was accordingly dismissed on the preliminary issue. Plaintiff appeals.

In support of the decree in appeal it is urged that on the authorities the plaintiff should, as there was no fresh cause of action, have applied for review or revision or have appealed, or at least have brought a suit to set aside the consent decree. It is further contended that as the Divisional Judge decided the point of jurisdiction it would be improper for an original Court subordinate to the Divisional Court to decide the question of jurisdiction afresh and in a manner contrary to the decision of its superior Court.

With regard to the latter contention, we are of opinion that there was no definite decision by the Divisional Judge that he had jurisdiction but that, as remarked above, the Divisional Judge under a manifest mistake of fact assumed a jurisdiction he did not possess. But even if the Divisional Judge had definitely decided the point of jurisdiction, we see no impropriety in a decision by an inferior Court to the contrary not in the same but in a collateral proceeding. We had occasion in Civil Appeal No. 875 of 1897 to discuss a like question of impropriety in a case where the consent decree was alleged to have been obtained by fraud and we therein held, referring to *Nistarini Dassi v. Nundo Lall Bose* ⁽¹⁾, at page 908, citing Willes, J., in *Queen v. Saddlers Coy.*, that there was no impropriety on an inferior Court deciding whether a fraud had been practised by one party upon another resulting in a consent decree in a superior Court, it being settled law that the nullity on the ground of fraud of a decree not set aside or reversed may be alleged in a collateral proceeding. And in the present case we consider there would be no impropriety in the original Court holding the decree of the Divisional Court in the

⁽¹⁾ *I. L. R.*, XXVI Cal., 891.

former suit to be a nullity on the ground of defect of jurisdiction, a defect which is patent on the record of that suit.

Nor do we find any force in the main argument of respondent's counsel. The mutation proceedings alluded to above disclose a fresh cause of action. But that matter apart (from) the authorities cited for respondent, *Dabee Dutt Shahoo v. Subodra Bibee* ⁽¹⁾, *Eshan Chandra Safooi v. Nunda Moni Dassee* ⁽²⁾, *Karmali Rahim Bhoj v. Rahim Bhoj Habib Bhoj* ⁽³⁾, *Mirali Rahim Bhoj v. Rahim Bhoj Habib Bhoj* ⁽⁴⁾, and *Virupakshappa v. Shidoppa*, ⁽⁵⁾, do not, if they are not distinguishable from the present case by reason of even defect of jurisdiction in the Divisional Court, lay down any rule showing the present suit should not lie. Those authorities throughout indicate a remedy by regular suit. This is a regular suit, which though originally not framed for the purpose of setting aside the consent decree will, if the claim is decreed, have that result. It is a suit in which the validity and effect of the consent decree are, on the pleadings, directly in issue. Farther the plaintiff was, we consider, entitled to ignore the consent decree as a nullity, though we must be clearly understood to express no opinion as to the effect of the compromise, a point which will have to be decided hereafter. For the defect in jurisdiction was not curable by consent of parties. *Haji Ahmad Hussain v. Sundar Lal* ⁽⁶⁾, and *Bibi Ladli Begam v. Bibi Raji Rahia* ⁽⁷⁾. A judgment delivered by a Court not competent to deliver it, *e.g.*, by a Court which had no jurisdiction over the parties on the subject matter of the suit, is a mere nullity (Field's Evidence Act, Section 44 of the Act). In *Ledgard v. Ball* ⁽⁸⁾, at page 203, their Lordships of the Privy Council say, "when a Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot by their mutual consent, convert it into a proper judicial process." The principle was re-affirmed in another Privy Council case. *Meenakshi Naidoo v. Subamaniya Sastri* ⁽⁹⁾.

For the above reasons we hold the consent decree to be no bar to the present suit. We reverse the order dismissing the suit, and remand the cause to the first Court for trial on the merits. Stamp on appeal in this Court to be refunded, other costs of this Court to be costs in the cause. *Appeal allowed, cause remanded.*

⁽¹⁾ 25 W. R., 449.

⁽²⁾ I. L. R., X Cal., 357.

⁽³⁾ I. L. R., XIII Bom., 137.

⁽⁴⁾ I. L. R., XV Bom., 594.

⁽⁵⁾ I. L. R., XIV I. A., 160.

⁽⁶⁾ I. L. R., XXIII Bom., 620.

⁽⁷⁾ 80 P. R., 1893.

⁽⁸⁾ I. L. R., XIII Bom., 650.

⁽⁹⁾ I. L. R., IX All., 191.

No. 38.

Before Mr. Justice Reid and Mr. Justice Harris.

ALAH BAKHSH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

SADIQ ALI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 435 of 1901.

Misjoinder—Parties—Joinder of plaintiffs—Persons jointly interested in a suit—Claims not antagonistic—Civil Procedure Code, 1882, Sections 26, 27, 31.

Certain Jats sued for a declaration that the land in suit was their property alleging that at Settlement the defendants had been wrongly entered as proprietors thereof. Subsequently certain butchers stating themselves to be proprietors of part of the land applied to be made co-plaintiffs. Finally a joint application to the same effect was made by the Jat plaintiffs and the butchers in which it was stated that they owned specified portions of the land.

The defence pleaded misjoinder. The objection being overruled, the butchers were added as co-plaintiffs. The plaint was not amended, but fresh pleas were taken and issues framed. After enquiry into the merits the first Court gave a joint decree in plaintiff's favour. On appeal the Divisional Judge considering that the impleading of the butchers as plaintiffs was wholly illegal and improper and had been effected at the wish and with the consent of the Jat plaintiffs dismissed the suit.

Held, that, as the rights of Jats and the butchers were not antagonistic and their causes of action were not distinct within the meaning of Section 31, Civil Procedure Code, but were common to all of the plaintiffs, and as no inconvenience had been caused to defendants by their joinder which had not in any way prejudiced the defence the suit was not bad for misjoinder.

Semle :—Where two sets of plaintiffs having distinct causes of action sue together such action is impliedly forbidden by the second paragraph of Section 31 of the Code of Civil Procedure, and the suit is bad for misjoinder, but even in such case it is not just for a Court to dismiss the suit on that ground, the proper course being for the plaint to be returned for amendment so that the plaintiffs might elect which set of plaintiffs should proceed with the suit.

Fakirapa v. Rudrapa ⁽¹⁾, *Haramoni Dassi v. Hari Charn Chowdhri* ⁽²⁾, *Ram Sewak Singh v. Nakched Singh* ⁽³⁾, *Asa Singh v. Indar Singh* ⁽⁴⁾, and *Read v. Brown* ⁽⁵⁾, cited.

⁽¹⁾ I. L. R., XVI Bom., 119.⁽²⁾ I. L. R., IV All., 261.⁽³⁾ I. L. R., XXII Calc., 833.⁽⁴⁾ 91 P. R., 1898.⁽⁵⁾ L. R., 22 Q. B. D., 128.

Joy Gobind Doss v. Gourceproshad Shaha (¹), *Kalian Rai v. Ram Rattan* (²), *Mohima Chandur Roy Chowdhry v. Atul Chandra Chakravarti Chowdhry* (³), and *Lingammal v. Chinna Venkatammal* (⁴), distinguished.

Salima Bibi v. Sheikh Muhammad (⁵), dissented from.

Further appeal from the decree of D. C. Johnstone, Esquire, Divisional Judge, Umballa Division, dated 14th December 1900.

Muhammad Shaffi, for appellants.

Muhammad Shah Din, for respondents.

The judgment of the Court was delivered by

HARRIS, J.—The following are the material facts. In 1897 4th March 1903.
certain Jats sued for a declaration that the land in suit was their property, alleging that at Settlement the defendants had been wrongly entered as proprietors thereof. On the 17th February 1898 certain butchers, stating themselves to be proprietors of part of the land, applied to be made co-plaintiffs. On the 5th March 1898 a joint application to the same effect was made by the Jat plaintiffs and the butchers in which it was stated that they owned specified portions of the land. Objection on the ground of misjoinder was at once taken by the defendants, but was overruled, and the butchers were added as co-plaintiffs. No order was given for amendment of the plaint, but fresh pleas were taken and the issues were freshly framed. The first Court gave all the plaintiffs jointly a declaration as to their proprietorship in the land without specifying any shares. After some proceedings in appeal which are not material the appeal by defendants came again before the Divisional Judge for decision on the 14th December 1900. After expressing an opinion that “the law infringed, if any,” was that contained in the second para. of Section 31, Civil Procedure Code, the Divisional Judge went on to say, “The unsoundness of the order making the butchers plaintiffs is so clear as hardly to require any discussion. If the Jats still claimed the land claimed by the butchers, the latter should have been made defendants; if the Jats did not claim that land, they should have been made to amend their plaint by the exclusion of that land, and the butchers should have been referred to a separate suit. I understand the latter to be the real state of affairs. It is said that irregularity, if any, can be cured by Section 578, Civil Procedure Code, but this is incorrect.”

(¹) 7, W. R., 202.

(³) I. L. R., XXIV Calc., 540.

(²) I. L. R., XVIII All., 306. (⁴) I. L. R., VI Mad., 239.

(⁵) I. L. R., XVIII All., 181.

"In my opinion the impleading of the butchers as plaintiffs was wholly incorrect and improper, and as it was done with the consent and even at the wish of the Jat plaintiffs, I think the proper order now is to accept the appeal, and order that the suit be dismissed with costs throughout."

Two petitions for revision of the above order were then filed in this Court by the Jat and butchers plaintiffs, respectively. The latter petition on application for certificate for further appeal being refused by the Divisional Judge, has been admitted as a further appeal in this Court, and a preliminary objection on the former petition that no revision could be had as no material irregularity is disclosed, has been overruled.

The two applications proceed upon similar grounds.

It is clear that if the suit under consideration is to be regarded as one by two sets of plaintiffs having distinct causes of action the provisions of the second para. of Section 31, Civil Procedure Code, which appear to be the only imperative provisions making a suit bad for misjoinder, would not allow of the suit proceeding in its present form, though even in that case the order of the Divisional Judge dismissing the suit would not be the proper order as he should have returned the plaint for amendment so that the plaintiffs might elect which set of plaintiffs should proceed with the suit. But we are not prepared to hold the suit bad for misjoinder. Counsel for respondents has not been able to cite any opposite authority, except *Salima Bibi v. Sheikh Muhammad* ⁽¹⁾, in support of his contention that the view taken by the Divisional Judge is correct, and he has had to direct his chief attention to an effort to distinguish the authorities against his contention. In addition to *Salima Bibi v. Sheikh Muhammad* ⁽¹⁾, he cites *Joy Gobind Doss v. Goureeproshad Shaha* ⁽²⁾, *Kalian Rai v. Ram Rattan* ⁽³⁾, *Mohima Chandra Roy Chowdhry v. Atul Chandra Chakarvarti Chowdhri* ⁽⁴⁾, and *Tingammal v. Ohinna Venkatammal* ⁽⁵⁾.

The first cited ruling *Joy Gobind Doss v. Goureeproshad Shaha* ⁽²⁾, was one under Act VIII of 1859. It is not in point. The title set up by the intervenor was not admitted by the plaintiff and was inconsistent with the plaintiffs' title. *Kalian Rai v. Ram Rattan* ⁽³⁾, so far as it concerns the present suit at

⁽¹⁾ 1. L. R., XVII All., 131.

⁽²⁾ 7 W. R., 202.

⁽³⁾ 1. L. R., XVIII All., 306.

⁽⁴⁾ 1. L. R., XXIV Cal., 540.

⁽⁵⁾ 1. L. R., VI Mad., 289.

all, merely lays down that Section 32 of the Code does not enable a Court to over-ride Section 31.

In *Mohima Chandra Roy Choudhry v. Atul Chandra Chakravarti Chowdhri* ⁽¹⁾, a suit was held bad for misjoinder because one plaintiff would by joinder of the other plaintiff be a defendant in his own suit. In *Lingammal v. Chinna Vencatammal* ⁽²⁾, it was held that inasmuch as Section 26, Civil Procedure Code (then Act X of 1877) did not authorise the joinder of plaintiffs with *antagonistic* claims arising out of distinct causes of action, a suit by a widow and an adopted son of a deceased Hindu claiming in the alternative was bad for misjoinder. The last mentioned Madras ruling was distinguished in *Fakirapa v. Rudrapa* ⁽³⁾, and expressly dissented from in *Harmoni Dass v. Harichurn Chowdhri* ⁽⁴⁾. On the other hand, in *Fakirapa v. Rudrapa* ⁽⁵⁾, it was held that where the claims of two plaintiffs are not antagonistic and both are jointly interested in disproving defendants' title, they could sue jointly under Section 26, Civil Procedure Code.

In *Harmoni Dass v. Harichurn Chowdhri* ⁽⁴⁾, plaintiffs complained of the same wrongful act of the defendant constituting infringement of their right, and it was held that as that infringement was their cause of action and as they all claimed the same relief, *viz.*, possession, and as their claims were not antagonistic one to another, the suit was not bad for misjoinder.

In *Ram Sewak Singh v. Nakched Singh* ⁽⁵⁾ a F. B. ruling, the plaintiffs though owning different shares in the same property were alike affected by acts of obstruction of the defendants to their possession, and it was held that they could join in bringing one suit. Straight, J., took the view that the 'cause of action' was the act of infringement of the right, a view which was not accepted in *Salima Bibi v. Sheikh Muhammad* ⁽⁶⁾, though the Judges in the later ruling stated that they expressed no dissent from the judgment of the Full Bench, and though they wished to restrict the application of the ruling to suits by Hindu or Muhammadan heirs.

In *Asa Singh v. Indar Singh* ⁽⁷⁾, a joint suit by reversioners with divisible rights was held to lie even if a 'cause of action' was not to be taken in the limited sense so as to include only facts constituting the infringement of the right, but to mean, as laid down in *Read v. Brown* ⁽⁸⁾, every fact which it would be necessary

⁽¹⁾ I. L. R., XXIV Cal., 540.

⁽²⁾ I. L. R., VI Mad., 239.

⁽³⁾ I. L. R., XVI Bom., 119.

⁽⁴⁾ I. L. R., XXII Cal., 833.

⁽⁵⁾ I. L. R., IV All., 261.

⁽⁶⁾ I. L. R., XVIII All., 131.

⁽⁷⁾ 91 P. R., 1898.

⁽⁸⁾ L. R., XXII Q. B. D., 128.

to prove, if traversed, in order to enable a plaintiff to sustain his action. The above wide meaning of 'cause of action' taken from English law was adopted in *Salima Bibi v. Sheikh Muhammad* ⁽¹⁾, and an opinion was therein expressed that under that definition a "number of persons each of whom has a separate "and distinct cause of action cannot be permitted to bring one "common suit against a wrong-doer because a separate wrong "which was committed against each of the parties, was committed at one and the same time and by the same act," and an instance is there given suggesting a *reductio ad absurdum*. We do not agree with the above view, which seems opposed to the Full Bench ruling of the same Court and to the view of the Calcutta and Bombay High Courts and to that of our own Court. The Madras High Court ruling is ancient history which has not repeated itself. If 'cause of action' is to be taken in its limited sense, the view taken in *Salima Bibi v. Sheikh Muhammad* ⁽¹⁾, is clearly wrong. And it seems to us that if part of the cause of action (in the wider sense) is common to all the plaintiffs, *e.g.*, one act infringing the rights of all the plaintiffs, jointly or severally, there cannot be said to be distinct causes of action. It is of course otherwise where there are distinct infringements, *C. A.* 1311 of 1897. And no case of non-possession arises, for if the causes of action are not distinct but inconvenience will be caused, the Court may, though not obliged to do so, direct separate suits to be brought under Section 45 of the Code. And the final decision in *Salima Bibi v. Sheikh Muhammad* ⁽¹⁾ was based upon the peculiar circumstances of the case, the co-plaintiff being found to be a trafficker in litigation joined with the obvious intention of evading any questions of title which might arise between him and his co-plaintiffs. In the present case the rights of Jats and the butchers are not antagonistic; their causes of action are not, we consider, distinct, within the meaning of Section 31, Civil Procedure Code, no inconvenience is caused to defendants by their joinder, nor prejudice to the defence. We therefore conclude that the suit is not bad for misjoinder. The order of the Divisional Judge dismissing the suit is set aside and the appeal in his Court is remanded under Section 562, Civil Procedure Code, for determination on the merits. Defendants-respondents will bear the costs of this Court.

Appeal allowed, cause remanded.

⁽¹⁾ *I. L. R.*, XVIII All., 131.

No. 39.

Before Mr. Justice Anderson.

PRICE,—(JUDGMENT-DEBTOR),—APPELLANT,

*Versus*GOLAK NATH AND OTHERS,—(DECREE-HOLDERS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 749 of 1901.

Execution of decree—Death of decree-holder—Abatement of execution proceedings—Admission of application to set aside abatement after time—Sufficient cause—Civil Procedure Code, 1882, Sections 365, 371, 372 A—Limitation Act, 1877, Section 5.

In an execution proceeding the decree holder having died in September 1898, the judgment-debtor, on the 18th October 1899, obtained an order from the executing Court for the removal of the attachment on the ground that no application in accordance with the provisions of Section 365, Civil Procedure Code, had been made by the representatives of the deceased decree-holder within the prescribed period of limitation. The circumstances were that the decree-holder, who was a Sikh Jat, had died and left a will, probate of which having been keenly contested by his heirs was not granted to the executors until April 1900. In May 1900 two out of the three executors filed an application for execution, but the judgment-debtor contended that by Section 365 of the Civil Procedure Code the application was time-barred.

Held, that the word "suit" includes all proceedings in a suit including the proceedings in execution, and that the executors were bound to make and capable of making the application at the time of the death of the testator, but that, under the peculiar circumstances of the case, there was sufficient cause preventing them from continuing the execution proceedings originated by the testator within the meaning of Section 371, Civil Procedure Code, and that therefore under the provisions of Section 372 A, Civil Procedure Code, and of Section 5 of the Limitation Act, they were entitled to an extension of the time for making the application to set aside the abatement order.

Mooza v. Essa ⁽¹⁾, *Khan Bahadur Nautahmat Shamshere Ali Khan v. Mussannat Ahmad Allahdi Begam* ⁽²⁾, *Ram Kripal v. Rup Kuari* ⁽³⁾, and *J. C. Bose v. Rani Bhagwan Kaur* ⁽⁴⁾ referred to.

Miscellaneous appeal from the order of A. E. Hurry, Esquire,

Divisional Judge, Umballa Division, dated 3rd July 1901,

Oertel, for appellant.

Roushan Lal, for respondents.

⁽¹⁾ *I. L. R.*, VIII Bom. 241.

⁽²⁾ 9 P. R. 1901.

⁽³⁾ *I. L. R.*, VI All., 269.

⁽⁴⁾ 63 P. R. 1900.

The judgment of the learned Judge was as follows :

23rd Jan. 1903.

ANDERSON, J.—This is an appeal from an order passed in execution proceedings permitting two out of three executors of the estate of the late Sardar Dial Singh to execute a decree passed in the Sardar's favour in his lifetime and put in force by him and defining the amount still outstanding.

The Courts below have agreed in their decision, and the present appeal proceeds on a variety of grounds, amongst others attacking the validity of the first Court's order, because an intermediate order and a calculation of interest had been written and computed by the Reader of the Court, pointing out the omission of one out of three executors' names in the application for execution was irregular, but the most important ground appears to be that the application for execution has abated as not having been made within three years of the last application made by the Sardar in his lifetime.

The order written by the Reader was not the final order passed by the executing Court, and it can scarcely be supposed that the Judge did not himself pass his own order in the case, although he may have acted with some irregularity in permitting the Reader to write out a formal order without himself signing it. This was made a ground of appeal to the Divisional Judge who omitted to notice it. It has not been pressed here and I do not think that the irregularity is so great as to vitiate the proceedings.

The present application was put in in the names of Messrs. Golak Nath and Harkishen Lal without mentioning the name of Mr. J. C. Bose, the third executor. No explanation is given as to this, and it was probably the result of accident. I do not think the defect is fatal. Supposing that one out of several executors had died before application was put in, it would have been valid, and, although the name of one was omitted, unless there be reason to believe that he dissented from the action of the others, it is most reasonable to hold that all acted in concert. It would also appear that Mr. J. C. Bose had given Mr. Golak Nath a general power of attorney to act for him in all cases connected with the executory and this before probate was granted.

The real difficulty in the case lies in this question whether, because the executors omitted to put in a specific application to revive execution (the judgment-debtor having, in October 1899, got the attachment struck off on the ground that no representative

of Sardar Dial Singh had been brought on the record), the proceedings should be regarded as having abated or not.

Mr. Oertel for appellant has cited the case of *Khan Bahadur Nawabzada Shamsheer Ali Khan v. Mussammat Ahmad Allahdi Begam* ⁽¹⁾ as an authority for holding that in the Punjab the word "suit" may be taken to include execution proceedings, that Section 365, Civil Procedure Code, becomes applicable, and that, if it were to be held that there was any valid application now before the Court, it was time-barred, nearly four years having elapsed since Sardar Dial Singh's own application.

The respondent does not admit the applicability of Section 365, Civil Procedure Code, and Article 175 A, Schedule II, Limitation Act, to execution proceedings and claims limitation under Article 178, alleging that the payments made by judgment-debtor previous to 18th October 1899 were steps in execution, and his application of that date was an admission that execution was continuing hence the application now under consideration, which was filed on 31st May 1900, is well within three years of the time when the right to apply accrued.

It is certain that the executors were not bound to wait till grant of probate before taking steps to have their names brought on the record, since probate does not affect the status acquired by them as executors on the death of the Testator, but only authenticates the will from which executors derive their title as was held in *Moosa v. Essa* ⁽²⁾.

The matter of probate of Sardar Dial Singh's will was keenly contested in this Court and forms the subject of the decision in the probate case of *Babu J. C. Bose and others, Propounders, v. Rani Bhagwan Kaur and others, Objectors* ⁽³⁾. The executors were, possibly, diffident of taking action and, apparently, apprehended that acts of theirs might be held invalid in case probate were not granted to them.

Such conduct was natural on their part, and, if there be no legal obstacle in the way, I think the Courts would be right in construing the law of abatement and limitation as liberally as possible in their favour.

Section 17 of the Limitation Act refers to the case when a person who would, if he were living, have a right to make an application dies before the right accrues, and provides that, in such a case, limitation shall be computed from the time when there

⁽¹⁾ 9 P. R., 1901. ⁽²⁾ I. L. R., VIII Bom., 241

⁽³⁾ 68 P. R., 1900.

is a legal representative of the deceased capable of making such application. In the present case, the executors would have been capable of making the application immediately they acquired the status, as held in the Bombay decision above referred to, but, as they were appointed executors of a Hindu or Sikh and had reason for thinking it possible enough that probate might be refused to them, I think it can be held, with reference to the provisions of Section 371, Civil Procedure Code, that there was a sufficient cause preventing them from continuing the execution proceedings originated by Sardar Dial Singh himself, and that the order of the first Court allowing the proceedings to be revived can be treated as an order on an application to set aside abatement or dismissal order of 18th October 1899, and that, under the peculiar circumstances of the present case the provisions of Section 372 A, Civil Procedure Code, and of Section 5 of the Limitation Act should be held to extend the time for putting in the application in the present case. In treating the execution proceeding as a suit I follow the view adopted in *Nawabzada Shamshere Ali Khan v. Mussammat Ahmad Allahdi Begam* (1), which was based on the precedent of *Gokul Kristo Chunder v. Aukhil Chunder Chatterji* (2).

The question as to limitation had been already decided on 30th November by an interlocutory order passed by Lala Damodar Das, Extra Assistant Commissioner, which the respondent contends should have been set aside before the point can be now raised. *Ram Kirpal v. Rup Kuari* (3) was cited as an authority.

I think, in the present case, that this order had become embodied in the final order which was passed within a comparatively short time, and that the question as to limitation, which was discussed in the Divisional Court, could be argued before and determined in this Court, certainly on revision if not in appeal.

The only remaining point which calls for remark has reference to the question of repayment. It is argued that credit has not been given for a sum of Rs. 600 said to have been paid before the decree was transferred for execution from Lahore to Umballa, and also that by an order passed on 27th July 1897 it was admitted that only Rs. 1,365-15-0 were then found to be due by Mr. Price to Sardar Dial Singh. There is also a complaint that the interest has not been properly calculated.

It appears to me that the Courts have done all that was necessary in the matter of reckoning the amount still due, and

(1) 9 P. R. 1801

(*) I. L. R., XVI Cal., 457.

(2) I. L. R., VI All., 269.

that it was for the judgment-debtor to show that the account as made up by the first Court is incorrect. He has alleged payments made to the Sardar in person, but has adduced no proof. It is not very likely that the execution has been pressed in such a way against the judgment-debtor as to give the decree-holder an unfair advantage.

The result is that the orders of the Courts below are upheld and this appeal is dismissed with costs.

Appeal dismissed.

No. 40.

Before Mr. Justice Chatterji and Mr. Justice Harris.

HIS HIGHNESS THE MAHARAJA OF FARIDKOT,—
(DEFENDANT),—APPELLANT,

Versus

BALL HOBSON AND CO.,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 201 of 1900.

Jurisdiction—Suit against ruling chief—Institution of suit without obtaining the consent of Governor-General in Council—Waiver by defendant of objection to consent—Effect of such waiver—Civil Procedure Code, 1882, Section 433.

Held, that the exemption from being sued in the Civil Courts in British India without the sanction of the Governor-General in Council conferred on independent ruling chiefs by Section 433, Civil Procedure Code, is a purely personal privilege capable of waiver and does create a defect of jurisdiction in the Courts, and that a defendant who is such a chief but who does not take the objection at the proper time waives his privilege thereby and cannot raise it for the first time in further appeal in the Chief Court.

Manohar Bhivray Potanis ⁽¹⁾, *Migbell v. Sultan of Johore* ⁽²⁾, *Beer Chundur Manik-kya v. Nobodeep Chunder Deb Burmono* ⁽³⁾, *Chandulal Khushalji v. Awad Bin Umar Sultan Nawaz Jung Bahadur* ⁽⁴⁾, and *Ledgard v. Bull* ⁽⁵⁾, cited.

Further appeal from the decree of D. C. Johnstone, Esquire, Divisional Judge, Umballa Division, dated 26th October 1899.

Clark, for appellant.

Gouldsbury, for respondent.

The judgment of the Court was delivered by

CHATTERJI, J.—This is a suit against the present Raja of Faridkot for money due (1) on an alleged undertaking by him

8th Jan. 1903.

⁽¹⁾ 2 Bom. H. C. R. A. C., 396. ⁽²⁾ I. L. R., IX Cal., 525.
⁽³⁾ L. R., 1 Q. B. (1894), 149. ⁽⁴⁾ I. L. R., XXI Bom., 851.
⁽⁵⁾ L. R., 18 L. A., 184.

to pay a pro-note executed by one Mr. Wallace in favour of the plaintiff, and (2) on account of articles supplied from plaintiff's shop. The pro-note of Mr. Wallace bears date 4th September 1893 and was payable in three months. The total claim amounts to Rs. 1,088-2-3 thus —

On account of the pro-note, principal	
and interest	Rs. 516-6-9
For goods supplied	„ 529-11-6
Interest on the second item	„ 42-0-0

The undertaking is alleged to have been made and the goods were supplied while the defendant was the heir-apparent of Faridkot. He still held the position when the suit was instituted, but succeeded to the rulership of that State before it was concluded.

The pleas were pleas on the merits, and no objection was taken at any stage of the suit that the defendant, as an independent native chief, was not amenable to the jurisdiction of a Civil Court in British India without the written sanction of the Governor-General in Council, under Section 433, Civil Procedure Code. Nor was this ground raised in the Court of first appeal.

The defence on the merits was (1) that the debt of Mr. Wallace was never taken over by the defendant, (2) that he was not liable for any item in the shop account not supported by a voucher.

The first Court decreed the claim with the exception of the interest, which it disallowed. The Divisional Judge on appeal upheld this decree.

The first ground taken in the appeal to this Court and the one on which most stress was laid in the argument before us, is that the lower Courts had no jurisdiction to entertain the suit under Section 433, Civil Procedure Code, without the written sanction of the Governor-General in Council, as the defendant is an independent ruling chief, and that no such sanction was possible under the circumstances.

It is perfectly true that no sanction could have been given in this case which does not come under any of the three clauses of sub-section (2) of Section 433. This, however, does not appear to us to affect the main question before us, though it would have been a cogent argument for not staying the proceedings in order that the sanction might be obtained if the suit had been filed without such sanction. That question is whether the

prohibition against the institution in Section 433, Civil Procedure Code, created a defect of jurisdiction in the Court to try the suit, or merely a personal exemption in favour of the defendant.

Jurisdiction or competency to take cognisance as applied to Courts of Justice is governed by general principles. Essential jurisdiction relates to the power of the Court to try cases with reference to their nature or money value. Similarly local jurisdiction as well as personal jurisdiction have reference to classes of cases falling under certain definitions, *e.g.*, cases in which the cause of action has arisen, or the defendant dwells or personally works for gain within the territorial limits of the Court's jurisdiction. Judged by these tests the Courts in this instance must be held to have been competent to try the present suit. The cause of action arose at Kasauli within the local limits of the first Court's jurisdiction as Subordinate Judge of Kasauli, and the defendant, then the heir-apparent of the Faridkot Chiefship, was living there when the suit was lodged. There is no question as to the power of the Courts to try the suit with reference to its nature and its money value.

But by Section 433 when defendant succeeded to the chiefship of the Faridkot State he became exempt from liability to be sued in the Court until a certain preliminary condition was fulfilled, *viz.*, the sanction of the Governor-General in Council was obtained. In terms this does not show that the Court had not jurisdiction to try the suit. It merely provides for the exemption of the defendant from being sued in a British Court when he fills a certain character, *i.e.*, is a ruling chief until the Governor-General removes that exemption under the provisions of the statute. Section 433 is no part of Chapter II of the Code which deals with the jurisdiction of Courts. It is part of Chapter XXVIII which lays down the procedure in suits by aliens and by or against foreign and native rulers. It is thus a rule of procedure regulating the institution of certain classes of suits, and the exemption is not a matter of jurisdiction properly so-called, but of privilege or immunity of a particular defendant.

Even if it is a matter of jurisdiction, it is not so in the sense in which it is held that the defect of jurisdiction is not capable of waiver, or that consent cannot confer jurisdiction. It appears to be merely a ground of objection which, if preferred by the defendant at the proper time, would lead to the dismissal of the suit *in limine*, but does not affect the competency of the Court to try it.

Where the exemption from jurisdiction is purely personal and is a mere privilege, it appears to be well settled in this country that the privilege or exemption may be waived. In *ex-parte Manohar Bhirrav Potanis* ⁽¹⁾ a personal exemption similar to that created by Section 433, Civil Procedure Code, was held to have been waived, because it was not pleaded at the proper time and the decree of the Court was held valid. A similar doctrine has been laid down in England where it has been held that a foreign independent Prince may elect to submit to the jurisdiction of any Court. *Migbell v. Sultan of Johore* ⁽²⁾.

It has been so held under Section 433 itself. See *Beer Chunder Manikkya v. Nobodeep Chunder Deb Burmono* ⁽³⁾. In a recent case *Chandulal Khushalji v. Awad Bin Umar Sultan Nawaz Jung Bahadur* ⁽⁴⁾, the whole question has been most exhaustively dealt with by Mr. Justice Strachey and the principle of waiver upheld. We agree generally with the reasoning adopted in the last named judgment and consider it unnecessary to discuss it in detail.

The case also appears to fall within the rule stated in the judgment of their Lordships of the Privy Council in *Ledgard v. Bull* ⁽⁵⁾, at page 145, *viz.*, that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial on the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit.

In Mr. Hukam Chand's learned treatise on the Law of Consent the following remarks of Mr. Harris on the rule above stated are quoted. "If a Court has jurisdiction over the subject matter and over the persons and a defendant has some privilege which exempts him from the jurisdiction he may waive it if he chooses to do so." He also cites the following passage from Herman's Commentaries: "A privilege defeating jurisdiction may be waived if the Court has jurisdiction over the subject matter."

With reference to the foregoing authorities we hold that the exemption of the defendant under Section 433 does not create a defect of jurisdiction properly so-called, but only a privilege in his favour, and that in any case the defect of jurisdiction is capable of waiver.

⁽¹⁾ 2 Bom., H. C. R. A. C., 396.

⁽²⁾ L. R. 1 Q. B. (1894), 149, at pp. 159, 160 and 164.

⁽³⁾ I. L. R., IX Calc., 535.

⁽⁴⁾ I. L. R., XXI Bom., 351.

⁽⁵⁾ L. R., 13 I. A., 134.

We also have no hesitation in holding that the defendant, by not taking the objection at the proper time, has waived his privilege and is not competent to raise the question at this stage. The first ground of appeal is accordingly over-ruled.

The second ground relates to a question of fact on which the lower Courts have come to a concurrent finding, *viz.*, whether the defendant did take over the liability of Mr. Wallace on the pro-note on himself. The first Court did not discuss the evidence, but the Divisional Judge has done so and given good reasons for his opinion. The evidence is not very definite, but we read the statement of Mr. Ball, senior, to mean that the defendant made the promise in his presence in the beginning of 1896 when the note was still running. He says, however, that it was made in presence of his son, but Mr. Ball, junior, only speaks of a promise in April 1898 when the note was already barred. Much is attempted to be made of this discrepancy, but the record of the subordinate Judge is very meagre, and we do not know whether Mr. Ball, senior, in referring to his son meant that he was present when the promise of 1896 was made, or that a subsequent promise confirming the previous one was made to him. The defendant did not contradict this evidence by getting himself examined, nor cross-examine the plaintiff and his son. Under the circumstances we cannot accept the contention of his counsel, or construe the evidence differently from the Divisional Judge. The finding that the promise was made must be upheld. We see no objection to a substitution of the original contract embodied in the pro-note by a fresh one by word of mouth which transferred the original liability to the defendant, the old contract being entirely rescinded or put an end to. Section 92 of the Evidence Act has no application to such a case. There is no doubt that there was consideration for the transfer. This ground also fails.

As regards the book debt the defendant's only objection was that he was not liable for items not supported by vouchers. His counsel did not press this point much, but left it in our hands. The accounts have been examined by an expert, and we see no good reason for dissenting from the view of the lower Courts. It is somewhat unreasonable to expect that there should be a voucher for every article supplied, particularly to a man of defendant's position.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 41.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice
Anderson.

RULIA,—(PLAINTIFF),—APPELLANT,

APPELLATE SIDE, {

Versus

RULIA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 1041 of 1899.

Limitation—Suit by reversioner on death of widow—Possession adverse to the female, adverse to the reversioner—Limitation Act, 1877, Schedule II, Articles 141, 142, 144.

Held, that in the Punjab adverse possession of a widow's estate by a trespasser during her life, no matter whatever the circumstances may be by which the adverse possession was obtained and continued, cannot be adverse against a reversioner or an effectual bar to his claim, and that limitation will begin to run against such reversioner only from the death of the female under Article 141 of Act XV of 1877, and not from the date of the commencement of such adverse possession.

Chiragha v. Mahtala ⁽¹⁾, *Baz Khan v. Sultan Malik* ⁽²⁾, *Tika Ram v. Shama Charan* ⁽³⁾, *Vundravandas Purshotamdas v. Cursondas Gorindji* ⁽⁴⁾, and *Runchordas Vundravandas v. Parvatibai* ⁽⁵⁾, cited.

Hanuman Prasad Singh v. Bhaganti Prasad ⁽⁶⁾, *Srinath Kur v. Prosunno Kumar* ⁽⁷⁾, *Azam Bhuyan v. Faizul-din Ahmad* ⁽⁸⁾, *Koolappa Naik v. Koolappa Naik* ⁽⁹⁾, *Lachhan Kunwar v. Manorath Ram* ⁽¹⁰⁾, referred to.

Saidulla v. Mussammat Laila ⁽¹¹⁾, dissented from

Further appeal from the decree of D. C. Johnstone, Esquire, Divisional Judge, Umballa Division, dated 2nd May 1899.

Jhanda Singh, for appellant.

Duni Chand, for respondents.

The judgment of the Court was delivered by

15th Dec. 1902.

ANDERSON, J.—This was a case in which a person claiming to be the reversioner of one Khiyali, who died in 1881, sued to eject certain persons as trespassers who had held the land during the lifetime of Khiyali's widow, Mussammat Chuhri, suit being brought within twelve years of her death and limitation claimed under Article 141, Schedule II of the Limitation Act.

The Courts below did not take the same view as to plaintiff's *locus standi*, as the first Court held the evidence produced did

⁽¹⁾ 79 P. R., 1898.

⁽²⁾ 43 P. R., 1901.

⁽³⁾ I. L. R., XX All., 42.

⁽⁴⁾ I. L. R., XXI Bom., 646.

⁽⁵⁾ I. L. R., XXIII Bom., 725, P. C.

⁽⁶⁾ I. L. R., XIX All., 357.

⁽⁷⁾ I. L. R., IX Calc., 934.

⁽⁸⁾ I. L. R., XII Calc., 594.

⁽⁹⁾ I. L. R., XVII Mad., 34.

⁽¹⁰⁾ I. L. R., XXII Calc., 445.

⁽¹¹⁾ 74 P. R., 1895.

not prove beyond the possibility of doubt that the pedigree table set up by him was correct, whilst the Divisional Judge has expressed himself as satisfied on this point, as the probabilities were strongly in favour of plaintiff.

Both Courts have agreed in holding that, although plaintiff's suit is brought within twelve years of the death of Mussammât Chuhri (who, in fact, died subsequent to 1897, when she and plaintiff's uncle, Hira, put in a suit to eject defendants whom they alleged to be tenants, yet limitation cannot be allowed him under Article 141 because there had been twelve years' adverse possession by defendants at the time of the widow's death.

This is the point on which the appeal was admitted to a hearing, and we have heard counsel at some length and referred to various rulings cited as bearing on it.

Appellant has relied on the ruling in the case of *Chiragha and others v. Mahtaba and others* ⁽¹⁾, on the opinion expressed by Chatterji, J., in the case of *Baz. Khan and others v. Sultan Malik and others* ⁽²⁾, on *Tika Ram v. Shama Charan* ⁽³⁾, and on *Vundravandas Purshotamdas v. Cursondas Govindji* ⁽⁴⁾, and the decision of the Privy Council in that same case reported as *Runchordas Vundravandas v. Farratiboi* ⁽⁵⁾.

In *Saidulla v. Mussammât Laila* ⁽⁶⁾, on which the Divisional Judge relied when holding suit barred, was dissented from, and it was pointed out that that decision does not amount to a ruling that where time has begun to run against the widow it continues on her death against the reversioners, against whom possession would become adverse twelve years after it had commenced against the widow.

In *Baz Khan and others v. Sultan Malik and others* ⁽²⁾, it was pointed out at page 143 that the discontinuance of possession which would have been fatal in the case of a male absconder, must be distinguished from discontinuance of possession by a female who has, under customary law, essentially a life estate and, at page 141 that, as the plaintiff's right accrued only after the widow's death (as in the present case), the fact that she intervened between the death of a former holder and the accrual of plaintiff's right should not make any difference to the latter.

The applicability of Article 141 in similar cases is discussed at length in Starling's Indian Limitation Act, page 314, and

⁽¹⁾ 79 P. R., 1898.

⁽²⁾ 43 P. R., 1901.

⁽³⁾ I. L. R., XX All., 42.

⁽⁴⁾ I. L. R., XXI Bom., 646.

⁽⁵⁾ I. L. R., XXIII Bom., 725, P. C.

⁽⁶⁾ 74 P. R., 1895.

onward, and it is remarked that the doubtful point will not be settled until a case goes up to the Privy Council on the point whether, in any case, adverse possession during the lifetime of the female can bar the reversionary heirs, or whether limitation runs against the reversionary heirs only from the death of the female, no matter what the circumstances may be under which the adverse possession was gained and continued.

So far as we are aware the ruling of the Privy Council in *Runchordas Vundravandas v. Parvotibai* ⁽¹⁾ was not unfavourable to the view that limitation runs against reversioners only from the date of the death of the Hindu or Muhammadan female, whatever the accompanying circumstances may be.

Respondents' counsel relied on *Hanuman Prasad Singh v. Bhaganti Prasad* ⁽²⁾, and *Tika Ram v. Shama Charan* ⁽³⁾, *Srinath Kur v. Prosunno Kumar* ⁽⁴⁾, *Azam Bhuyan v. Faiz-ud-din Ahmed* ⁽⁵⁾, *Koolappa Naik v. Koolappa Naik* ⁽⁶⁾, and also on *Lachhan Kunwar v. Manorath Ram* ⁽⁷⁾, and claimed that all High Courts except that of Bombay are in favour of his contention and, in the present case, argued that, as defendants had asserted adverse possession against the whole world in 1883, Article 141 had no application, but rather Article 144.

We do not consider that except in the Allahabad rulings, the doctrines of which were not accepted in *Baz Khan v. Sultan Malik* ⁽⁸⁾, and in the first of which the decision was given in favour of the reversioners, the principle contended for by respondent has been clearly accepted. *Lachhan Kunwar v. Manorath Ram* ⁽⁷⁾ is distinguished as not ruling that adverse possession by a stranger during the period would be effectual to bar a claim by a reversioner.

But in the Punjab, where parties follow customary law and the estate of the widow is a strictly limited one for her life only, we are of opinion that there can be no question as to the applicability of a doctrine differing from that enunciated by the High Court of Allahabad. This view was followed in the Divisional Bench ruling of *Chiragha v. Mahtaba* ⁽⁹⁾, and although the case of *Baz Khan v. Sultan Malik* ⁽⁸⁾ was decided on a different point, the matter was very fully discussed there and a strong

⁽¹⁾ I. L. R., XXIII Bom., 725.

⁽²⁾ I. L. R., XIX All., 357.

⁽³⁾ I. L. R., XX All., 42.

⁽⁴⁾ I. L. R., IX Calc., 934.

⁽⁵⁾ I. L. R., XII Calc., 594.

⁽⁶⁾ I. L. R., XVII Mad., 34.

⁽⁷⁾ I. L. R., XXII Calc., 445.

⁽⁸⁾ 43 P. R., 1901.

⁽⁹⁾ 79 P. R., 1898.

opinion was expressed by one of the Judges on the Bench not dissented from by his colleague.

We notice that Article 141 as now drawn differs from the same article under the former Act, and the intention of the Legislature seems to have been to do away with the anomalies which surrounded a Hindu widow's estate and to assimilate it, for limitation purposes only, to that of the estate of an ordinary tenant for life. The case of the widow of an agriculturist in the Punjab is pre-eminently that of a tenant for life, as the customary law does not contemplate that her interest in ancestral land can ever become absolute. To allow laches on her part to affect a possible claim by reversioners, who take their title from an ancestor common to themselves and to the last male owner, would be a contradiction in terms, cutting at the root of the whole theory of customary succession.

Taking the decision of the Divisional Judge as one allowing the plaintiff *locus standi*, but ruling his suit out of time as not falling within the terms of Article 141, but of Article 144 of Schedule II of the Limitation Act, we accept the appeal and remand the case to his Court for decision of the appeal preferred to his Court on the merits. Stamp to be refunded. Costs of this Court to be costs in the cause.

Appeal allowed.

No. 42.

Before Mr. Justice Reid and Mr. Justice Harris.

SANT SINGH,—(DEFENDANT),—APPELLANT,

Versus

JOWALA SAHAI,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 489 of 1900.

Custom—Pre-emption—Andar Shahr Bazar, Peshawar—Vicinity—Burden of proof.

Found, that the custom of pre-emption based on vicinity extends to a building site formerly occupied by a shop in the Andar Shahr Bazar, a sub-division of the city of Peshawar.

Although the existence of a custom of pre-emption in a particular sub-division, such as is referred to in Section 11 of the Punjab Laws Act, has to be established, instances in the neighbouring sub-divisions though not of themselves sufficient to prove the existence of such a custom in that sub-division, are evidence of such existence.

Chirinjit Mal v. Mussammat Mitho ⁽¹⁾, *Hakim Rai v. Muhammad Din* ⁽²⁾, *Raman Mal v. Bhugat Ram* ⁽³⁾, *Natha Singh v. Lilla Singh* ⁽⁴⁾, *Imam Din v. Ghulam Muhammad* ⁽⁵⁾, *Kishen Singh v. Jai Kishen Das* ⁽⁶⁾, *Gobind Ram v. Sayad Ahmad* ⁽⁷⁾, and *Shankar Das v. Sayad Ahmad* ⁽⁸⁾ referred to.

Nanni Mal v. Sheo Nath ⁽⁹⁾ discussed from.

Further appeal from the decree of F. Field, Esquire, Divisional Judge, Peshawar Division, dated 2nd April 1900.

Lal Chand, for appellant.

Beechey and Sukh Dial, for respondent.

The judgment of the Court was delivered by

9th March 1903.

HARRIS, J.—The question for our decision is whether there exists a custom of pre-emption by vicinage extending to a building site formerly occupied by a shop in the Andar Shahr sub-division of Peshawar city.

The first Court, treating the case as one of pre-emption of a shop and finding the right to pre-empt on sale of a shop not proved, dismissed the claim. The Divisional Judge found a custom of pre-emption to exist in the sub-division, and that the custom applied to the present case in which the plaintiff's *katra* wall adjoined the site in dispute.

The vendee here appeals from the decree of the Divisional Court on the ground that the custom does not exist in the Andar Shahr sub-division, and that even if it does plaintiff has failed to prove preferential right.

It is not contended that, for the proof of the custom under Section 11, Punjab Laws Act, Andar Shahr is not the sub-division. In *Charanjit Mal v. Mussammat Mitho* ⁽¹⁾, in which the custom of pre-emption with regard to a building site in the Karimpura sub-division was found to exist, the five main quarters into which, according to the Peshawar Gazetteer, the city of Peshawar is divided, *viz.*, Sarasia, Jehangirpura, Andar Shahr, Karimpura and Ganj, were held to be the pre-emption sub-divisions of Section 11. According to the Gazetteer the Andar Shahr quarter is that inhabited by the wealthier Hindus, and was almost entirely burnt to the ground in June 1898. The site in suit is the site of a shop in the Andar Shahr Bazar which was then burnt down.

⁽¹⁾ 29 P. R., 1888.

⁽²⁾ 86 P. R., 1901.

⁽²⁾ 83 P. R., 1901.

⁽⁶⁾ 2 P. R., 1903.

⁽³⁾ 17 P. R., 1895.

⁽⁷⁾ 10 P. R., 1886.

⁽⁴⁾ 58 P. R., 1900.

⁽⁸⁾ 153 P. R., 1884.

⁽⁹⁾ 64 P. R., 1897.

Neither of the lower Courts has properly detailed the alleged instances of the custom, and it becomes necessary to examine those instances. Before doing so a contention put forward here for appellant that proof of the custom should be restricted to instances in the sub-division needs notice. As is pointed out in *Hakim Rai v. Muhammad Din* ⁽¹⁾, it was at one time contemplated by a learned Judge of this Court that instances in other sub-divisions might by themselves be sufficient to prove the custom in the sub-division (per Plowden, Judge, in *Nanni Mal v. Sheo Nath* ⁽²⁾), but the above view was dissented from in later rulings (*Raman Mal v. Bhagat Ram* ⁽³⁾, *Natha Singh v. Billa Singh* ⁽⁴⁾, and *Imam Din v. Ghulam Muhammad* ⁽⁵⁾), when such instances were treated as evidence supplementary to evidence afforded by instances in the sub-division. As is stated in *Imam Din v. Ghulam Muhammad* ⁽⁵⁾, Section 11 of the Punjab Laws Act does not lay down the mode of proof. No doubt where there are sub-divisions, such as are referred to in Section 11, it is the custom in the particular sub-division in which the property is situate which has to be established, but there appears nothing in the comprehensive phraseology of Section 13 of the Evidence Act which makes transactions or instances otherwise relevant irrelevant merely because those transactions or instances are beyond certain local limits. And it is evident that except in very special cases the sub-divisions of a town or city for purposes of pre-emption are not only arbitrary but often very ill-defined. It is within the bounds of possibility that the property sold may be partly in one and partly in another sub-division, or that the defining line between two sub-divisions runs down the middle of a street or bazar. In such cases it would appear absurd that custom should apply to part of the property, and that different customs should exist for like properties on either side of the street. We therefore find no sufficient reason for rejecting instances in neighbouring sub-divisions as irrelevant, though by themselves they would be insufficient to prove the custom in the sub-division in which the property is situated.

We must also remark that we are unable to regard the property here in suit in the same light as a shop. The shop on the site was burnt down, and the site only remains. The nature of the property is changed though of course the nature of the surrounding properties may affect the character of the proof requisite

⁽¹⁾ 83 P. R., 1901.⁽³⁾ 17 P. R., 1895.⁽²⁾ 64 P. R., 1887.⁽⁴⁾ 58 P. R., 1900.⁽⁵⁾ 86 P. R., 1901.

for the establishment of the custom (cf., *Kishen Singh v. Jai Kishen Das* ⁽¹⁾, at page 9). From what we have been able to gather from the evidence on the record it is quite possible that a dwelling house may be erected on the site in suit. What plaintiff had to prove was that the adjacence of the site to his *katra* at the back gave him a right to pre-empt, the vendee having no contiguous property.

In *Charanjit Lal v. Narsingh Das* in 1880 the right of pre-emption by vicinage in the case of a house in Andar Shahr was on contest found to exist. In *Ghulam Jan v. Atma Ram*, also in 1880, after enquiry by a local commission as to the whole city of Peshawar pre-emption of four shops in Karimpura, which sub-division appears to be adjacent to Andar Shahr, was decreed. In *Ghulam Rasul v. Muhammad Amin*, a case in 1882 of pre-emption of shops, houses and vacant site adjoining the pre-emptor's *katra*, the claim was dismissed on the ground that the plaintiff had not proved that his right was superior to that of the vendee. The property was in Andar Shahr and the enquiry appears to have been a careful one. The existence of a custom of pre-emption by vicinage extending to property of the nature of that then in suit was after contest, the vendee denying the existence of the custom found to exist. That is an instance directly in favour of the present claim. In *Ghulam Kadir v. Mahbub Shah*, a case of 1888 of pre-emption of shop property in Bazar Kissa Khani, the vendee admitted the existence of the right. We consider the oral evidence in the present case proves, though the point is contested, that Kissa Khani bazar is part of the Andar Shahr sub-division. We cannot accede to the contention that the above instance is valueless to prove the custom. It is an instance of recognition of a right which is relevant under Section 13 of the Evidence Act. In *Nao v. Churan Das* in 1895 the vendee seems to have issued notice to possible pre-emptors and the custom was recognized. The case was of house property in Andar Shahr. In *Charanjit Mal v. Mussammil Mitho* ⁽²⁾, the custom of pre-emption in the Karimpura sub-division extending to the site of a burnt house by vicinage was found to exist. In *Gobind Ram v. Sayad Ahmad* ⁽³⁾, and *Shankar Das v. Said Ahmad* ⁽⁴⁾, the properties do not appear to have been within the Andar Shahr sub-division, but pre-emption by vicinage was recognized. Of the other judicial instances cited, *Ganga Bishen v. Ala Dad* was the case of a shop in Karimpura and followed the

⁽¹⁾ 2 P. R., 1903.

⁽³⁾ 10 P. R., 1886.

⁽²⁾ 29 P. R., 1888.

⁽⁴⁾ 153 P. R., 1884.

decision in *Charanjit Mal v. Mussammot Mitho* ⁽¹⁾, *Mirza Ghulam Ali v. Ghulam Habib* was of a *serai* in the Ganj sub-division and was dismissed, as was the claim of *Muhammad Din v. Nasrullah Khan*, the case of a *serai* in sub-division Sarsia, on the ground that though custom extended to shops it had not been proved to extend to *serais*.

The above instances show that there is general assertion and recognition and even judicial decision after contest in favour of the custom of pre-emption by vicinage in sub-division Andar Shahr, which is a quarter of a Muhammadan city of some antiquity. The case of 1882 is directly in point. Those instances are supported by oral evidence, the right of which, so far as it goes, is in the matter of existence of the custom, certainly in plaintiff's favour. The fact that after the fire of 1898 there were several sales without attempt to enforce the custom is probably due to pre-emptors having lost all their property and not being in a position to fight a case in Court. We agree with the Divisional Judge, an officer of considerable judicial experience in Peshawar cases, that the plaintiff has succeeded in proving the custom asserted by him to apply to a vacant building site in Andar Shahr and plaintiff is entitled to the decree given. The appeal is dismissed with costs.

Appeal dismissed.

No. 43.

Before Mr. Justice Reid and Mr. Justice Harris.

RAHMAT ALI KHAN,—(PLAINTIFF),—APPELLANT,

Versus

HAMID-UD-DIN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 535 of 1900.

Custom—Pre-emption in towns—Rival claimants—Vicinage—Preferential right—Burden of proof—Punjab Laws Act, 1872, Section 11.

Held, that where rival claimants to the pre-emption of house property in towns assert superior right by vicinage, each has to prove his vicinage to be of a superior kind, and in such cases, if the plaintiff fails to establish a local custom under which he has a superior right against his rival claimant and the respective claimants' rights are found to be equal, preference must be given to him who has shown superior diligence by suing first.

(1) 29 P. R., 1888.

Rur Singh v. Tansukh Rai ⁽¹⁾, *Karam Ilahi v. Ali Bakhsh* ⁽²⁾, *Chaudhri Khem Singh v. Mussammat Taj Bibi* ⁽³⁾, *Nawab Muhammad Mumtaz Ali v. Khan Ali* ⁽⁴⁾, *Mela Ram v. Prema* ⁽⁵⁾, *Mohkam Din v. Karimulla* ⁽⁶⁾, and *Ram Chand v. Abdul Hak* ⁽⁷⁾, cited

Karim Bakhsh v. Khwaja Bakhsh ⁽⁸⁾, *Gokal v. Bhola* ⁽⁹⁾, *Mahtab-ud-din v. Karam Ilahi* ⁽¹⁰⁾, *Serh Mal v. Hukam Singh* ⁽¹¹⁾, *Kalan Khan v. Ram Sarn Das* ⁽¹²⁾, and *Jhandu v. Umar Din* ⁽¹³⁾ distinguished.

Muhammad Salamatulla v. Jalal-ud-din ⁽¹⁴⁾, dissented from.

Further appeal from the decree of W. A. Harris, Esquire, Divisional Judge, Delhi Division, dated 19th February 1900.

Muhammad Shaffi, for appellants.

Muhammad Shah Din, for respondents.

The judgment of the Court was delivered by

25th Feb. 1903.

HARRIS, J.—A, B, of the plan in file, was originally one house and is in Delhi city. B was purchased by Hadi Hussain Khan at auction sale on the 2nd October 1893. A, which was owned in the following shares, Jafir Hussain Khan one-half, Mussammat Sakina Begam one-quarter, and Mussammat Hidayat Begam one-quarter, was mortgaged by the owners on the 3rd October 1893 to Jamal-ud-din.

On the 22nd September 1897 the house property partially adjoining A to the south-east and coloured green in the plan, was sold to Rahmat Ali, minor son of Ahmad Ali Khan. On the 8th October 1897 Jafir Hussain Khan gifted his one-half share in A to the sons of Jamal-ud-din, and on the same day Mussammat Sakina Begam sold her one-quarter share to Ahmad Ali Khan. On the 13th October 1897 Mussammat Hidayat Begam sold her one-quarter share to Ahmad Ali Khan.

On the 14th February 1898 Mussammat Aghai Begam, widow of Hadi Hussain Khan, as co-sharer in B, brought two suits for pre-emption on the sales by Mussammats Sakina and Hidayat Begams to Ahmad Ali Khan.

On the 24th March 1898 the sons of Jamal Din sold their one-half share in the equity of redemption of A gifted to them by Jafir Hussain Khan, to Mussammat Aghai Begam.

⁽¹⁾ 82 P. R., 1889.

⁽²⁾ 199 P. R., 1889.

⁽³⁾ 83 P. R., 1888.

⁽⁴⁾ 36 P. R., 1897.

⁽⁵⁾ 109 P. R., 1900.

⁽⁶⁾ 102 P. R., 1881.

⁽⁷⁾ 32 P. R., 1899.

⁽⁸⁾ 20 P. R., 1881.

⁽⁹⁾ 29 P. R., 1892.

⁽¹⁰⁾ 73 P. R., 1898.

⁽¹¹⁾ I. L. R., XX All., 100.

⁽¹²⁾ 97 P. R., 1880.

⁽¹³⁾ 17 P. R., 1889.

⁽¹⁴⁾ 24 P. R., 1887.

On the 28th March 1898 Rahmat Ali sued his father Ahmad Ali Khan for pre-emption on the sales by Mussammat Sakina and Hidayat Begams. Mussammat Aghai Begam was not made a party to the suit, though she should have been added as defendant, and on the 28th June 1898 her suits being still pending, Rahmat Ali obtained a decree by confession of judgment.

On the 12th August 1898 Rahmat Ali sued Mussammat Aghai Begam for pre-emption on the sale of the 24th March 1898 and obtained a decree on the 1st December 1898. Review was applied for on the same day. The application for review was granted, and eventually on the 9th May 1899 Rahmat Ali's suit was dismissed.

In the meantime Rahmat Ali, on the 12th December 1898, sued for redemption of the mortgage of 1893. On the 22nd December 1898 Rahmat Ali purchased from Jafir Hussain Khan the half share in equity of redemption of A, which the latter had already gifted to the sons of Jamal-ud-din in 1897. On the 13th March 1899 Rahmat Ali sued for closure of a door between A, and B, Rahmat Ali's injunction suit was dismissed on the 25th July 1899, on which date Mussammat Aghai Begam was given decrees in her pre-emption suits, instituted on the 14th February 1898. Following the result of the pre-emption suits brought by Mussammat Aghai Begam in which Rahmat Ali was made a defendant, the redemption suit by Rahmat Ali was dismissed on the 5th August 1899.

Rahmat Ali appealed against the decrees in the three pre-emption suits (*viz.*, the two suits by Mussammat Aghai Begam and the suit by him of the 12th August 1898) and in the redemption and injunction suits, but all five appeals were dismissed by the Divisional Judge. Rahmat Ali has, in those five cases, preferred five further appeals to this Court (Nos. 532 to 536 of 1900).

Appeals Nos. 532 and 533 arise out of the suits by Mussammat Aghai Begam on Mussammat Sakina and Hidayat Begams' sales, respectively.

Appeal No. 534 arises out of the injunction suit.

Appeal No. 535 arises out of the suit by Rahmat Ali dismissed on review.

Appeal No. 536 arises out of the redemption suit.

In the injunction and redemption suits there was no decision on the merits, the dismissal of those suits and appeals therein being based upon the result of the pre-emption suits. The Courts have held that ordinarily Rahmat Ali and Mussammat Aghai Begam would have equal rights of pre-emption, but that the latter by instituting her suit first had preference by reason of superior diligence. But whatever view we take of the conflicting rights of pre-emption, it is clear that we cannot now decide the injunction and redemption claims on the merits. Argument has, therefore, been confined to the question of pre-emption.

In the redemption suit a further appeal lies as of right, and as the matter of pre-emptive right directly affects the right to redeem on payment of a large sum of money, we find no force in the preliminary objection that the certificates given by the Divisional Judge for further appeal in the other causes are bad, apart from the existence of questions of law and custom which undoubtedly arise in those appeals. The objection has only been raised by counsel for the sons of Jamal Din, mortgagees, and it is overruled.

For Rahmat Ali, appellant, it is contended (1) that Mussammat Aghai Begam is not a co-sharer in B; (2) that the application for review should not have been granted; (3) that even if Mussammat Aghai Begam be a co-sharer in B, Rahmat Ali has a preferential right by vicinage; (4) that Mussammat Aghai Begam should not have been held to have a preferential right by reason of superior diligence; (5) that if the rights were equal Rahmat Ali should have a half share.

On the first question we agree with the concurrent findings of the Courts below. There was no evidence that a partition had been effected. The evidence adduced in Mussammat Aghai Begam's suit on Mussammat Sakina Begam's sale appears to us conclusive on the point.

It is next argued that under Section 626 (b), Civil Procedure Code, the application for review should not have been granted as the evidence excluded was within the knowledge of the applicant and could have been adduced in the earlier proceedings. We do not, however, understand the excluded evidence to have ever been alleged to be the new evidence afterwards discovered, referred to in Section 623 and Section 626 (b). It was evidence which the applicant knew of and did not produce owing to the parties having attempted a compromise, and we agree with the

Courts below that there was "sufficient reason" within the meaning of Section 623 for granting the application.

The third question is whether Rahmat Ali or Mussammat Aghai Begam has superior right to pre-empt. A general customary right by vicinage is admitted. A contention that Mussammat Aghai Begam had to prove superior right because Rahmat Ali first obtained decrees is untenable. Rahmat Ali's decree to which Mussammat Aghai Begam was a party was set aside.

In the other pre-emption suit in which Rahmat Ali got a decree Mussammat Aghai Begam was not a party, and the circumstances clearly point to it being a collusive decree. That decree did not perfect Rahmat Ali's title, as the matter of preferential right was directly in issue in the then pending suits by Mussammat Aghai Begam. Further no authority has been cited to point to the analogy between such a case and that of a second purchase before suit. Rahmat Ali bases his claim to preference on the fact that the doorway of his house and of house A is common, whereas house B is back to back with house A and opens on another street. His counsel cites *Kalan Khan v. Ram Sarn Das* ⁽¹⁾, *Muhammad Salamatulla v. Jalal-ud-din* ⁽²⁾, and *Jhandu v. Umar Din* ⁽³⁾.

The case of *Kalan Khan v. Ram Sarn Das* ⁽¹⁾ does not appear to be in point. It was there held without discussion that in Gurdaspur town the fact of opening on the same lane did not, but that the existence of a common wall did give a superior right. In the present case both parties have walls common with house A.

In *Jhandu v. Umar Din* ⁽³⁾, a case of Batala, it was only found that the plaintiff whose house adjoined at the back had not proved a superior right to the vendee whose house adjoined at the side and opened on the same street.

It was certainly laid down by Tremlett, J., in *Muhammad Salamatulla v. Jalal-ud-din* ⁽²⁾, (a case from Panipat) that, "the same principle which prefers a neighbour to one who is not one, would give a preference to a neighbour through whose gateway and over whose ground the house is approached, to one who is only a neighbour, because the back of his house adjoins the one sold, but whose approach is from a different

⁽¹⁾ 97 P. R., 1880.

⁽²⁾ 24 P. R., 1887.

⁽³⁾ 17 P. R., 1889.

"side." But the decision in that case appears to have resulted from an enquiry as to special local custom, and so far as it may have been based upon a consideration of the fact that the approach was from different sides it is opposed to later decisions of this Court. *Rur Singh v. Tansukh Rai* ⁽¹⁾, *Karam Ilahi v. Ali Bakhsh* ⁽²⁾, and *Chaudhri Khem Singh v. Mussammat Taj Bibi* ⁽³⁾. And so far as the common gateway is concerned it must be borne in mind that where both parties assert superior right by vicinage each has to prove his vicinage to be of a superior kind. *Nawab Muhammad Muntaz Ali v. Khan Ali* ⁽⁴⁾. In *Mela Ram v. Prema* ⁽⁵⁾, it was laid down after a reference to numerous authorities that "considerations of equity, convenience, privacy, exclusion of strangers and the like doubtless underlie the custom of pre-emption, but the law requires that it should be proved in a concrete form, and it is not open to the Court to assume the existence of any particular incident in the absence of proof merely because such incident can be supported on those considerations."

Our attention has not been called to any evidence in support of the incidents of custom alleged, and the history of the properties and a consideration of the plan do not lead us to the conclusion that privacy or right of way is in danger of invasion if plaintiff is not allowed to pre-empt.

For the above reasons we find that Rahmat Ali has not proved that his right is preferential to that of Mussammat Aghai Begam.

The question remains whether Mussammat Aghai Begam has established a preferential right by exercise of superior diligence in filing her suits before Rahmat Ali filed his suit. There is the authority of previous rulings of this Court in favour of Mussammat Aghai Begam. *Mokham Din v. Karimulla* ⁽⁶⁾ and *Chaudhri Khem Singh v. Mussammat Taj Bibi* ⁽³⁾ are directly in point, and the opinions of the learned Judges who were chiefly responsible for those rulings are entitled to great weight.

Mokham Din v. Karimulla ⁽⁶⁾ is on all fours with the present case in that Mussammat Aghai Begam made Rahmat Ali a party, whereas Rahmat Ali did not make Mussammat Aghai Begam a party. In *Chaudhri Khem Singh v. Mussammat Taj Bibi* ⁽³⁾ only a week elapsed between the filing of the two suits.

(1) 82 P. R., 1889.

(2) 199 P. R., 1889.

(3) 83 P. R., 1888

(4) 36 P. R., 1897.

(5) 109 P. R., 1900.

(6) 102 P. R., 1881.

The principle laid down in those rulings has not in this Court been departed from, and has been recently recognised in *Ram Chand v. Atul Hak* ⁽¹⁾. Counsel for Rahmat Ali can only call our attention to rulings in land suits. *Karim Bakhsh v. Khula Bakhsh* ⁽²⁾, *Gokal v. Bhola* ⁽³⁾, *Mahtab-ud-din v. Karam Ilahi* ⁽⁴⁾, and *Serh Mal v. Hukam Singh* ⁽⁵⁾, which are inapplicable. In such land cases in the Punjab the decision has rested upon an interpretation of Section 12 (d) of the Punjab Laws Act, and the distinction between cases so to be decided and those of house property in towns under Section 11 of the Act is clearly drawn (see *Gokal v. Bhola* ⁽³⁾, Civil Appeal 1232 of 1891 and Civil Appeal 136 of 1892). The expression of opinion by Rivaz, Judge, in *Gokal v. Bhola* ⁽³⁾, at page 119 is *obiter dictum*. Difficult questions may arise as to what constitutes superior diligence. But on the other hand if the principle is to be followed that all claimants with equal rights in house property in a town or city who might in some cases be numerous and whose claims might be instituted at widely different times, are to share, the difficulty of partition might prove insuperable. Besides, the question of possible difficulty apart, it is for the person alleging a customary right under Section 11 to prove that by that custom he is entitled to share, and if no such custom is proved Section 6 of the Act provides an equitable rule.

We consider that the equities of the case as disclosed by the history of the various transactions are strongly in favour of Mussammat Aghai Begam and against Rahmat Ali. Whatever the minor Rahmat Ali's diligence may have been, it was presumably that of this father Ahmad Ali, the vendor, who would benefit by his son's decree. Mussammat Aghai Begam instituted her claim some time before Rahmat Ali, minor, was instigated to make a claim.

We agree therefore with the Courts below in holding Mussammat Aghai Begam to have a preferential right to Rahmat Ali.

The result is that this appeal (No. 535) and appeals Nos. 532, 533, 534 and 536 are dismissed with costs.

Appeal dismissed.

⁽¹⁾ 32 P. R., 1899.

⁽²⁾ 29 P. R., 1892.

⁽³⁾ 20 P. R., 1881.

⁽⁴⁾ 73 P. R., 1898.

⁽⁵⁾ I. L. R., XX All., 100.

No. 44.

Before Mr. Justice Chatterji and Mr. Justice Harris.

MUHAMMAD NAWAZ KHAN AND ANOTHER,
—(DEFENDANTS), —APPELLANTS,

Versus

MUSSAMMAT BOBO SAHIB,—(PLAINTIFF),—
RESPONDENT.

Civil Appeal No. 45 of 1900.

Custom—Pre-emption—Mohalla Kassaban, Ferozepore city—Effect of vendee's parting with his own property the title in which gave him the right of pre-emption—Punjab Laws Act, 1872, Section 11.

Held (1) that the city of Ferozepore is divided into sub-divisions within the meaning of Section 11 of the Punjab Laws Act, (2) that the custom of pre-emption as regards dwelling houses prevails in *mohalla* Kassaban which is such a sub-division, and (3) that the plaintiff had failed to establish that he had a superior right of vicinage to that of the vendee merely because his house is contiguous with that in suit to a greater length and opens on the same part of the common street as the latter.

A vendee, defendant, having rights of pre-emption on the ground of vicinage does not forfeit them if he parts with his own property through which he had the rights immediately after the purchase and can set up those rights in defence of his purchase.

Sohava Mal v. Chottu Mal ⁽¹⁾, *Chaudhri Khem Singh v. Mussammal Taj Bibi* ⁽²⁾, *Rur Singh v. Tansukh Rai* ⁽³⁾, and *Nawab Muhammad Muntaz Ali v. Khan Ali* ⁽⁴⁾, cited.

Ram Asra v. Gurditta ⁽⁵⁾, *Thakur Das v. Muhammad Bakhsh* ⁽⁶⁾, *Rama Mal v. Bhagat Ram* ⁽⁷⁾, *Atma Ram v. Devi Dyal* ⁽⁸⁾, and *Muhammad Ayub Khan v. Rure Khan* ⁽⁹⁾, referred to.

Further appeal from the decree of Rai Bahadur Lala Buta Mal, Additional Divisional Judge, Ferozepore Division, dated, 24th November 1899.

Lal Chand, for appellants.

Ishwar Das, for respondent.

The judgment of the Court was delivered by

31st Decr. 1902.

CHATTERJI, J.,—This is a case of pre-emption in the city of Ferozepore, *mohalla* Kassaban. The material facts are briefly these. Plaintiff's house and that in suit lie side by side and open on the same *Kucha* or lane which after running a short distance

⁽¹⁾ 154 P. R., 1882.

⁽²⁾ 83 P. R., 1888.

⁽³⁾ 82 P. R., 1889.

⁽⁴⁾ 36 P. R., 1897.

⁽⁵⁾ 42 P. R., 1891.

⁽⁶⁾ 100 P. R., 1892.

⁽⁷⁾ 17 P. R., 1895.

⁽⁸⁾ 49 P. R., 1901.

⁽⁹⁾ 95 P. R., 1901.

to the west beyond the disputed house bifurcates and runs at right angles north and south, the southern branch passing by the house alleged by the defendant to be his property and then becoming closed.

The disputed sale took place on 12th March 1897. In that month, according to the statement of the defendant-vendee, the latter's house was sold by his son Muhammad Nawaz Khan to Bahadur Khan, the seller of the house claimed, and a suit by him for its recovery was pending when the present claim was brought. He lost it in two Courts. The first Court made no attempt to ascertain the exact date of sale of the defendant's house which was very important. We have had this omission rectified in this Court by causing a certified copy of the deed to be filed.

The defendant pleaded that there was no custom of pre-emption in *mohalla* Kassaban, and that even if there was any custom, he had a superior right on the ground of contiguity. Plaintiff denied that defendant was the owner of the house by virtue of which he resisted the claim and urged that in any case plaintiff's right was superior.

The material issues were as follows :—

1. Does the custom of pre-emption obtain in Ferozepore ?
2. Whether the disputed house is situate in *mohalla* Kassaban or any other *mohalla* which may be treated as a subdivision of Ferozepore within the meaning of Section 11 of the Punjab Laws Act ?
3. Does the custom prevail in all subdivisions of the town ?
4. Is the defendant-vendee owner of the house which he claims as his, marked A on the plan filed ?
5. Is plaintiff's right of pre-emption superior ?

The first Court found that there were no subdivisions in the town of Ferozepore within the meaning of the Punjab Laws Act ; that the custom of pre-emption prevailed generally in the town of Ferozepore ; that the house by virtue of which the defendant-vendee claimed to have equal rights of pre-emption with the plaintiff was no longer his but had been sold by his son, and that in any case plaintiff, by reason of his house and that in suit opening on the same part of the street, of the greater length of contact between them and of the wall between them being joint, had a superior right. On appeal the Divisional Judge remanded the

case for a further inquiry into the question whether Ferozepore had subdivisions recognized by the law. The return was that it had not, but that the custom of pre-emption prevailed generally in the town of Ferozepore. The Divisional Judge thereupon upheld the findings of the first Court on all points and affirmed its decree.

The points for determination in this appeal upon the pleadings appear to be—

1. Whether Ferozepore has subdivisions within the meaning of Section 11 of the Punjab Laws Act.

2. Whether, if the house in suit is situate within such a subdivision, the custom of pre-emption is shown to prevail within it in respect of house property.

3. Whether, if the town has no recognized subdivisions, the custom of pre-emption prevails generally in the town of Ferozepore in respect of residential houses.

4. Whether, if pre-emption prevails in the quarter of the city in which the said house is situate, defendant-vendee is owner of the house marked A, situate on the west of the disputed house, on the strength of which he asserts an equal right of purchase with plaintiff.

5. Whether, if defendant's ownership of the house is established, plaintiff's right is superior to his.

The fourth point may be disposed of in a few words. The defendant lost his case in two Courts, and apparently for this reason the decision of the lower Courts has been adverse to him on this question. The defendant has since compromised his case with the purchaser and got back the house on payment of certain expenses undergone by the latter but with a full acknowledgment of his own title in it. The lower Courts, however, have rightly decided against defendant on the facts known to them at the time of their decision, and we do not think the deed of compromise, to which the plaintiff is no party, makes any real change in the situation. Had we to decide on these facts there can be no doubt that the finding of the lower Courts on the fourth point was bound to be upheld.

But the additional evidence taken by us by causing the production of a copy of the deed of sale of defendant's house, the genuineness of which is not disputed by the plaintiff, has put a different aspect on this part of the case. It appears that the sale took place on the same date that the sale of the house in suit

was effected, *viz.*, 12th March 1897, and as far as can be gathered from the language of the two deeds, was earlier in point of time, for the disputed sale mentions defendant's house as belonging to Muhammad Nawaz Khan (defendant's son who professed to sell it as his agent) in giving the boundaries to the west, while Muhammad Nawaz Khan's deed in favour of Bahadur Khan gives the disputed house as its boundary to the east, and describes it as having been purchased by the defendant. They both appear to have been presented for registration about the same time and are numbered consecutively, but the number of the disputed sale-deed, 191, comes first. Fractions of a day are not counted in law unless questions of right depend upon them. Here the difference in point of time between the execution of the two deeds was very small, but the language leaves no doubt as to which deed was the earlier one, though it may have been so by a few minutes only. But this priority in time of the disputed sale has a most important bearing on the question of right to pre-empt, and we have accordingly heard a second argument from counsel on this point with reference to the additional evidence produced before us. After giving every weight to the contentions of plaintiff's counsel, we are constrained to hold, in consequence of the relative priority in point of time of the sale in suit, that defendant was still the owner of the house to the west, the title to which is the subject of the fourth issue in the Court of first instance when the disputed house was sold. This will be our finding on the fourth point for determination in this appeal.

Coming now to the first point, we are of opinion after a consideration of the evidence and the arguments of counsel that the town of Ferozepore is divided into subdivisions within the meaning of Section 11 of the Punjab Laws Act. We cannot agree with the reasoning of the lower Courts which take a contrary view. In the first place Ferozepore is a comparatively large place, the population of which according to the census of 1901 amounts to 49,341. In 1881 it amounted to 39,570. These figures include the cantonment. The population of the city proper amounted to 23,415 in 1901. Its growth also has been gradual, though somewhat rapid in recent years. It is natural to expect that it should be divided into quarters known by separate names, and we see no cogent reason why these subdivisions should not be treated as subdivisions under Section 11. A goodly array of authorities have been cited by counsel on both sides bearing on

the question what constitutes a subdivision under Section 11 of the Punjab Laws Act, but we see no necessity to discuss them in detail. We agree with *Sohava Mal v. Choita Mal* ⁽¹⁾ that the section refers to main subdivisions of a city, not to lanes and streets within such subdivisions. It was held in *Ram Asra v. Gurditta* ⁽²⁾, that a *mohalla* consisting of only 70 houses in the town of Bhera which had 2,700 houses was not by its "situation, construction or character" fit to be recognized as a subdivision, but this judgment did not lay down any fixed principle beyond expressing a disinclination to treat such a small portion of a comparatively large town as a subdivision contemplated by Section 11. In *Thakar Das v. Muhammad Bakhsh* ⁽³⁾ an almost equally small section of the town of Jagraon was recognized as a subdivision as it was known as a separate quarter of it and was called a *mohalla*. It is obvious that where a town is divided into well known *mohallas* or quarters and the *mohallas* again are subdivided into sections called after names of streets or lanes along which houses are grouped, both cannot be treated as subdivisions under Section 11. It is more difficult to say whether a particular quarter of the town should or should not be treated as a subdivision for purposes of the pre-emption law. Size is doubtless an important element in the decision of this point, but every case must be judged by its own facts as the above cited authorities show, and no hard and fast rule can be laid down.

In the present instance there is nothing to show that *mohalla* Kassaban is too small to be treated as an independent subdivision. The name appears to be well known according to the evidence and is applied to a fairly considerable area within the city of Ferozepore containing several streets and lanes. It is also called *mohalla* Rajputan according to the evidence, but that name is less commonly used. In the deed of sale of the disputed house, in the plaint and in plaintiff's first statement the name *mohalla* Kassaban is used, and it was not till a later stage that plaintiff's pleader denied that the *mohalla* was a subdivision. We have already said that the town of Ferozepore being a large one, there is *prima facie* good ground for thinking that it is divided into separate and well known *mohallas*. We find also that at least in two cases of pre-emption which came to Court subdivisions were recognized as existing in it. Sardar Gurdial Singh, Divisional Judge, in 1896, in the suit of *Khuda Bakhsh*

⁽¹⁾ 154 P. R., 1882.

⁽²⁾ 42 P. R., 1891.

⁽³⁾ 100 P. R., 1892.

v. Ghulam Muhammad, held that the custom did not exist in *mohalla* Kharadian. In 1898 Sheikh Khuda Bakhsh, in the case of *Shahab Din, Appellant, v. Gaman, Respondent*, held that *mohalla* Dhobian, in which the house in dispute in that suit was situate, was part of a subdivision of Ferozepore called Jaurawali *masjid* and that the custom of pre-emption prevailed in it. The reasons given by the lower Courts for holding that there are no subdivisions in the town of Ferozepore are not at all convincing. It is possible that the exact limits of a *mohalla* cannot be defined, but it is hardly ever difficult to tell whether or not a certain house is situate in a particular *mohalla*. From this difficulty, however, in laying down the exact boundaries of a subdivision it does not follow that the subdivision itself does not exist. Here there is ample evidence to show that the disputed house is situate in a quarter of Ferozepore that is generally called *mohalla* Kassaban though it is possible that other names are applied to it. We hold, accordingly, that Ferozepore contains subdivisions for purposes of pre-emption, and that *mohalla* Kassaban is one of them, and this is our finding on the first point.

As regards the existence of the custom of pre-emption, we think on the whole that the finding of the lower Courts is substantially correct, and we see no cogent reason to disagree with their concurrent opinion. A number of cases in which the right was exercised have been produced, and several respectable and intelligent witnesses have also deposed to the existence of the right in various parts of the town, fortifying their statements by reference to precedents within their knowledge.

Eight of the decided cases have been referred to in the judgment of the Court of first instance and they are mentioned with material facts in page 4 of the printed paper book. In most of them the right was admitted, but two were fought up to the Divisional Court, and the existence of the right was affirmed. It is argued that cases in which the right was admitted and there was no inquiry into the existence of the custom are valueless as precedents, and *Raman Mul v. Bhagat Ram* ⁽¹⁾ and certain other authorities are quoted in support of this position. We fully agree with the principles laid down in these judgments, but the remarks on the value of cases decided on admission or in which the right was not contested appeared to us to be extended beyond their proper scope in the argument. A case in which

(1) 17 P. R., 1895.

pre-emption is claimed and decreed on admission is an instance in which the custom is exercised within the meaning of the Evidence Act and is relevant in an inquiry into the custom in a subsequent suit, and this certainly was not meant to be denied in those judgments. But there are countless motives which might actuate a defendant in making an admission in Court, and so it is difficult to say that the knowledge of the existence of the custom alone impelled him to make the admission. The value of it therefore to a large extent depends upon the circumstances of the particular case. The remarks about the valuelessness of the admission in the judgments cited must have reference to the facts of the case in which it was made. But where there are numerous instances of such admission in suits of this kind relating to the same place, it is generally a fair inference that they were due to the custom being too well known to admit of dispute. Taking the judicial instances and those cited by the leading witnesses for the plaintiff and the opinions of the latter into consideration, we find that a strong case has been made out in favour of the existence of the right in many *mohallas* of the city of Ferozepore. The rebutting evidence is not so strong. There are only two cases quoted in which the right has been disallowed. One is *Khuda Baksh v. Ghulam Muhammad* already referred to above, decided by the Divisional Judge on 8th April 1896, but it relates to *mohalla* Kharadian which the first Court points out is at a great distance from *mohalla* Kassaban. The other is C. A. No. 3 of 1899, in which it was held by this Court that the right of pre-emption as to shops was not proved to exist in the Ludhiana bazar of Ferozepore. Shops stand on a different footing from residential houses according to the later decisions of this Court, and the precedent last cited has therefore no bearing on the present case. We accordingly hold that the lower Courts are right in their view that pre-emption exists generally in the city of Ferozepore, *i.e.*, in many, if not most, of its subdivisions as regards dwelling houses. We cannot of course lay down that it prevails throughout the city as we hold it contains subdivisions within the meaning of Section 11 of the Punjab Laws Act, and as the point has been decided in the negative as regards *mohalla* Kharadian.

Coming now to the question whether the custom is shown to exist in *mohalla* Kassaban we are of opinion that there is no sufficiently strong ground for differing from the view of the lower Courts that it is. The cases in other *mohallas* of the city show that the right of pre-emption is recognized therein, and

though this is not sufficient to prove the existence of the right in this *mohalla* they lend support to the conclusion deducible from the two judicial cases in regard to house property situate in it. One of these, *Mussammât Sultan Bibi v. Miran Bakhs*, was decided on defendant's admission of plaintiffs' claim. In the second case also the right of pre-emption was admitted, but the vendee asserted a superior claim on the ground of vicinity which was found correct, and the suit was dismissed. By themselves these cases would hardly have sufficed to prove the existence of the right in *mohalla* Kassaban, but supported by the precedents in the other *mohallas* we think they are sufficient to establish it, we accordingly hold that the right has been shown to exist in this *mohalla* and this is our finding on the second point for determination.

The third point need not be discussed.

The fourth point has already been found in defendant's favour on the new evidence produced before us.

As regards the fifth point we are unable to concur with the view of the lower Courts. Having regard to the respective positions of plaintiff's and defendant's houses with reference to the house in suit, we cannot see any cogent ground for giving preference to plaintiff. Her house and that in suit open on the same street side by side, and there is a greater length of contiguity between them on the east side of the latter house. But defendant's house also opens on the same street though at a little distance further on and on the southern extension of the street and it also adjoins the disputed house on the west though not for the whole length on that side. On these facts we do not think greater contiguity or a superior right of pre-emption can be said to be established in plaintiff's favour. The leading case on the subject is *Chaudhri Khem Singh v. Mussammât Taj Bibi* ⁽¹⁾, the principles laid down in which have been followed ever since by this Court. That was a much stronger case for the plaintiff than the present one, but it nevertheless failed (see *Rur Singh v. Thansukh Rai* ⁽²⁾) and *Nawab Muhammad Mumtaz Ali v. Khan Ali* ⁽³⁾. There is no sufficient proof and no decided precedent that the circumstances alleged as respects plaintiff's house are sufficient to confer a prior right. The first Court laid stress, on a new ground, *viz.*, that the western wall of the disputed house

⁽¹⁾ 83 P. R., 1888. ⁽²⁾ 82 P. R., 1880.

⁽³⁾ 36 P. R., 1897.

was joint with plaintiff, but there is no proof of this on the record, and plaintiff never alleged it in her plaint or at any stage of the proceedings. We are unable to accede to her counsel's request to allow her a remand to prove it now.

It is also urged that defendant having at all events immediately parted with his own house ought not to be allowed to retain the one in suit on the strength of his ownership of that house. But he is defendant, not plaintiff, and the question of priority must be decided with reference to the circumstances existing at the time of his purchase and not at any later period, and if he was entitled to purchase at the time of sale he did not forfeit his right by parting with his own house afterwards. It would have been different had the plaintiff been in his position, *Atma Ram v. Devi Dyal* ⁽¹⁾, and *Muhammad Ayub Khan v. Rure Khan* ⁽²⁾. In fact defendant has now got back his house and it is possible that it was sold without his consent, though he may have been legally bound by the act of his son. But the matter is of no consequence.

As the defendant's right to buy was at least equal to that of the plaintiff we think the claim must fail.

We accept the appeal and dismiss the plaintiff's claim, but as she has lost only in consequence of evidence produced for the first time in this Court, we direct that the parties pay their own costs throughout.

Appeal allowed.

No. 45.

Before Mr. Justice Chatterji.

GURMUKH SINGH,—(DEFENDANT),—PETITIONER,

Versus

SUNDAR SINGH,—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 1721 of 1902.

REVISION SIDE. }

Religious Institution—Liability of, for debts incurred by mahant—Duty of lender when advancing money to heads of religious institutions—Necessity.

Held, that it is not sufficient for persons who lend money to heads of religious institutions and desire to charge the institutions with liability to show that the purposes for which the loans are taken are necessary but they must also show that they made inquiries and satisfied themselves that on the occasion on which they made the advance the loan was justified by the state of the institution's finances.

Kashi Ram v. Bawa Tola ⁽¹⁾, cited and followed.

Petition for revision of the order of Lal Achhru Ram, District Judge, Ferozepore, dated 13th June 1902.

Ishwar Das, for petitioner.

Dhanpat Rai, for respondent.

The judgment of the learned Judge was as follows :

CHATTERJI, J.—I think the finding of the District Judge is insufficient to charge the defendant with liability for his predecessor's debt. It is not enough that the purposes for which the loans were taken were necessary purposes, *e.g.*, payment of revenue or wages of servants and the like, but it must also be found that it was necessary to borrow for those purposes. This distinction is obvious, and, if it is not borne in mind, the *mahant* may have an ample income and spend it all on himself and for payment of Government revenue or expenses of the kitchen, borrow money from time to time. If this is allowed the institution must sooner or later cease to exist. Persons who lend money to heads of religious institutions are bound to inquire whether the occasion on which they advance money is such that the loan is justified by the state of the funds of the institution and the purpose for which the loan is taken. See *Kashi Ram v. Bawa Tola* ⁽¹⁾.

18th April 1903.

This is the issue on which the District Judge must find in the plaintiff's favour before he can decree the plaintiff's claim. He can make any further inquiry he thinks fit and allow the parties to produce further evidence in order to throw light on the question before him.

I set aside the District Judge's decree and return the case to him for a fresh decision of the plaintiff's appeal with reference to the above remarks.

Application allowed.

No. 46.

Before Mr. Justice Reid and Mr. Justice Harris.

UMRA,—(DEFENDANT),—APPELLANT,

Versus

HARA,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 736 of 1900.

Custom—Pre-emption—Right of, on mortgages—Wajib-ul-arz.

Plaintiff claimed a right of pre-emption in respect of a mortgage of certain land situated in mauza Ghola, tahsil Zafarwal, and relied in support

} APPELLATE SIDE.

⁽¹⁾ 3 P. R., 1902.

of his claim upon entries in the *Wajib-ul-arz* of 1855 of the village. The entries were to the effect—"Asl hakiyat kisi ki rahn nahin. Ba waqt zarurat jo koi intikal apni hakiyat ka chahega hasb kimat mukarrar zamindaran-i-dihat kurb jowar jab tak hakiki wa hissadaran patti ya dusri patti ke malik khwahen honge hakiyatdar ko bai wa rahn hakiyat ka shakhs ghair ke hath na hoga."

These entries were not repeated in any subsequent *Wajib-ul-arz* and notwithstanding the fact that there had since been numerous mortgages the plaintiff had not shown a single instance where there had been an attempt to assert a right of pre-emption extending to mortgages in accordance with the provisions of the *Wajib-ul-arz*.

Held, that the entries in the *Wajib-ul-arz* of 1855, relating to the existence of an alleged custom, unsupported by instances of its having been ever exercised, and contradicted by the entries themselves which expressly mentioned that there had never been any instance, and that they had been made for future guidance, could not be deemed to be sufficient evidence of such a custom.

Dilsukh Ram v. Nathu Singh (¹) and *Sham Ram v. Mussammat Hemi Bai* (²), cited.

Further appeal from the decree of Maulvi Inam Ali, Divisional Judge, Sialkot Division, dated 1st May 1900.

Muhammad Shah Din, for appellant.

Roshan Lal, for respondent.

The facts of the case are fully stated in the judgment of the Court delivered by

19th March 1903.

HARRIS, J.—This is a suit for pre-mortgage of land and the claim has been decreed conditional on payment of a sum of money in accordance with the prayer. We cannot regard the suit as a declaratory suit, as contended for appellant-mortgagee, and we have called upon appellant to pay Rs. 14 additional court-fee on a 5 jama value.

Both the Courts below held the mere entry in the *Wajib-ul-arz* of the village made at settlement of 1855 sufficient to establish a custom of pre-emption with respect to mortgages. We cannot agree with that view, and we consider that the appeal must succeed.

The clause of the *Wajib-ul-arz* in question runs thus: "Asl hakiyat kisi ke rahn nahin. Ba waqt zarurat jo koi intikal apni hakiyat ka chahega, hasb kimat mukarrar zamindaran-i-dihat kurb jowar, jab tak hakiki wa hissadaran patti ya dusri patti ke malik khwahen honge, hakiyatdar ko bai wa rahn hakiyat ka shakhs ghair ke hath na hoga."

(¹) 98 P. R., 1894, F. B.

(²) 73 P. R., 1896.

No extract from any subsequent *Wajib-ul-arz* is on the record, nor is it here alleged for either party that there is any other mention of pre-emption in subsequent settlements. As is apparent from the above extract there had been no mortgage in the village up to settlement of 1855. It seems that there have been numerous mortgages since, but not in one case has there been any assertion of a right of pre-emption extending to mortgages. In this Province it has been held by a Full Bench ruling of this Court (*Dilsukh Ram v. Nathu Singh* ⁽¹⁾), that such an entry in a *Wajib-ul-arz* is not an agreement in the sense of contract, but may be regarded as evidence of a local custom. The Full Bench did not decide though it expressed an opinion that the particular entry in that case was sufficient to prove the local custom.

It is somewhat difficult to conceive the existence of a custom where not only is no instance of the exercise of that custom alleged, but where it is expressly mentioned that there never has been an instance and that only if such a case arises in future will a certain procedure be followed. But taking the Full Bench ruling to be correct, we think that the presumption arising from the clause in the *Wajib-ul-arz* is rebutted in this case by the fact that notwithstanding numerous mortgages since the clause was drafted, in no single instance has there been an attempt to assert a right in accordance with the provisions of the clause. In *Sham Ram v. Mussummat Hemi Bai* ⁽²⁾, an entry as to custom in a *Wajib-ul-arz* was held insufficient to shift an *onus* though *Dilsukh Ram v. Nathu Singh* ⁽¹⁾ was referred to. It was for plaintiff to prove the alleged custom, and it is to be remarked that as the mortgagee-defendant is also a land-holder in the village it is not even clear that if the clause of the *Wajib-ul-arz* were to be followed his right would be inferior to that of plaintiff, the order of precedence not being specified as it was in the *Wajib-ul-arz* of *Dilsukh Ram v. Nathu Singh* ⁽¹⁾.

We are unable therefore to hold plaintiff to have succeeded in establishing a right to take over the mortgage. We therefore accept the appeal and, reversing the decrees of the Courts below, we dismiss the claim.

As there are some circumstances in favour of the equity of plaintiff's claim, and the case is somewhat hard upon him, we direct each party to bear his own costs throughout the litigation.

Appeal allowed.

(1) 98 P. R., 1894, F. B.

(2) 73 P. R., 1896.

NOTE.—The same point was again decided in the following case:—

Before Mr. Justice Anderson and Mr. Justice Robertson.

APPELLATE SIDE. }

MAKHA,—(PLAINTIFF),—APPELLANT,

Versus

KAIM AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 829 of 1900.

Farther appeal from the decree of H. Scott Smith, Esquire, Divisional Judge, Amritsar Division, dated 16th July 1900.

Muhammad Shah Din, for appellant.

Beechey, for respondents.

The judgment of the Court was delivered by

3rd April 1903.

ANDERSON, J.—After over-ruling a preliminary objection as to alleged abatement we have heard the appeal which refers to a suit brought to enforce a claim to pre-mortgage based on custom.

The Courts below have disagreed. The first Court held that as the existence of such a custom could be predicated from a certain entry in the *Wajib-ul-arz* of 1852 which had never been abrogated and that, although there were eighteen instances in which the recorded custom had been departed from, significance could be attached to no more than seven of these, this was not enough to establish the defence. In arriving at this decision the first Court relied on *Dilsukh Ram v. Nathu Singh* (1), *Buland Khan v. Thakur Das* (2), and *Masta v. Pohlo* (3).

The second Court, whilst holding that the entry in the *Wajib-ul-arz* was *prima facie* evidence of the existence of the custom alleged, was of opinion that the numerous instances in which land had been mortgaged to non-proprietors without objection showed that there was no such custom really in existence and that this evidence quite outweighed the entry in the *Wajib-ul-arz*.

The entry is to the effect that hitherto there has been no sale nor mortgage in the village, but that in future every proprietor shall be considered entitled to alienate to pay Government demand or necessary expenses, but must allow a preference to reversioners and proprietors (*shar-kaian wa malikan*) failing whom he might alienate to strangers.

In the next settlement it is declared that the order of Government in such matters will be obeyed. The first Court remarked that the effect of the promulgation of the Punjab Laws Act in 1872 was to make custom the rule of decision in such cases and before us *Masta v. Pohlo* (3) was cited as an authority for the view that such an entry as that in the previous *Wajib-ul-arz* of 1852, being one relating to custom, was not to be understood as one in force for a limited period.

(1) 98 P. R., 1894, F. B. (2) 10 P. R., 1887.

(3) 52 P. R., 1896.

It has been argued for appellant that, as the *onus* rested on the defendant, who was unable to cite any instance in which a claim to enforce pre-mortgage by a proprietor as against a non-proprietor had failed, the presumption arising as to the correctness of *Wajib-ul-arz* had not been got over, and that the fact that a good many mortgages in favour of non-proprietors had been permitted to pass unchallenged led to no secure inference, as it was discretionary for the proprietors to take steps to enforce their rights.

In this connection the dictum of Plowden, S. J., at pp. 356-357 of *Dilsukh Ram v. Nathu Singh* ⁽¹⁾ is relied on when he observes, alluding to a similar entry in a *Wajib-ul-arz*. "A declaration such as we have here "is not ordinarily intended to create any new power or right and does "not, in my opinion, operate by conferring any new power or imposing "any new obligation. It is merely an explicit definition of an existing "power and an existing obligation by the group of persons who are "interested in the subject of the declaration as co-sharers." Further that the absence of instances should never be taken as disproving the existence of a well ascertained right.

For respondents it is contended that the claim is an exceptional one, founded on an obsolete clause of the old *Wajib-ul-arz* of 1852, and that the entry represents no real custom but is an attempt to legislate as shown by the use of the word *ayanda*, and if a custom it would be a bad one never having been acted on and not having been shown to be ancient and invariable.

As regards the entry in the Settlement of 1865, respondent's learned counsel pointed out that in 1852 there was no pre-emption law in force although the Punjab Civil Code was probably applied, and the failure to state the custom as it is supposed to have been stated in 1852 has some significance and shows that no such custom was recognised. It was also pointed out that, following the F. B. ruling of 1894, which dealt with a case of mortgage by way of conditional sale and not simple mortgage, the entry in the *Wajib-ul-arz* is no more than a piece of evidence giving rise to an inference as to the existence of a custom which may be strong or weak, and it has the effect of settling the question of initial *onus*. It is therefore open to any person to show that existing custom has been entered incorrectly in a *Wajib-ul-arz* by others or by himself or his representative at settlement.

The instances of alienation by mortgage are so numerous that it is difficult to believe "*sharkaiian*," i. e., reversioners would not once have preferred a claim till the present one was put in, and it is fair to have expected the other side on whom the *onus* may be regarded as having shifted, to quote some instance in their favour.

The case depends entirely on the question of *onus*. The initial *onus* rests on defendant, and in our opinion he has sufficiently discharged it. In the Delhi case *Dilsukh Ram v. Nathu Singh* ⁽¹⁾, no such evidence

(1) 98 P. R., 1894, F. B.

was forthcoming and the alienation in question was one by way of conditional sale.

Whilst fully recognizing the agnatic principle we should be reluctant to hold, unless fully satisfied on the point, that a person proposing to alienate a portion of his land for the better management of his affairs must find an agnate ready and willing to lend him the money required. We understand the appellant's learned counsel to argue that a stranger thus taking over land might be impelled to misuse his opportunities and take all he could out of it, and that rack-renting and deterioration in quality of the land might be the result, but we scarcely think this is to be anticipated.

In the present case we think the reasons given by the Divisional Judge for relying on the eighteen instances of alienation to non-proprietors which were allowed to pass uncontested are sound, and that he has taken a sensible and correct view of the case in holding that the evidence as to actual practice in the village for many years, reckoning from 1868 onwards, far outweighs the entry in the *Wajib-ul-arz* of 1852, which was, not improbably, the handiwork of some petty official recently imported from the Regulation Provinces to the newly annexed Punjab and can scarcely be said to record a certain and well ascertained custom.

We do not conceive that the Full Bench ruling of 1894 was intended to prevent a commonsense view being taken in cases of pre-mortgage, which as is well known is far more charily asserted than pre-emption on sales. The ruling of the Bench was merely that such entries in the *Wajib-ul-arz* were not to be regarded as agreements, but that, in the case referred, a right of *shufa* by local custom had been proved and the Divisional Bench disposed finally of the case in accordance with the opinion expressed by Plowden, S. J.

The present case appears to us to be distinguishable as the defendant has been able to produce proof sufficient to refute the entry and to rebut the presumption of its correctly stating the custom as regards pre-mortgage.

The appeal is accordingly dismissed with costs.

No. 47.

Before Mr. Justice Anderson.

THAKAR SINGH,—(PLAINTIFF),—PETITIONER,

Versus

HIRA SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Revision No. 1913 of 1901.

Custom—Alienation—Gift by widow with the consent of the nearer reversioners—Suit by reversioner of equal degree.

Held, that the fact that certain nearer reversioners assented to a gift by a widow of her late husband's property in favour of a near reversioner does not bar the claim a reversioner equally entitled with the alienee.

REVISION SIDE. }

Jivan Singh v. Misri Lal (1), *Harvans Singh v. Harnam Singh* (2), *Murad v. Mussammat Jannat* (3), *Mussammat Fatteh Bibi v. Allah Bakhsh* (4), *Gharib Khan v. Mirza Ali Bahadar Khan* (5), and *Jumma v. Imam Bakhsh* (6), referred to.

Petition for revision of the order of Captain G. C. Beadon, Divisional Judge, Jullundur Division, dated 11th March 1901.

Harris, for petitioner.

Browne, for respondents.

The judgment of the learned Judge was as follows:—

ANDERSON, J.—This is a revision, raising a question of custom, *viz.*, whether the fact that certain nearer reversioners have assented to a gift by a widow in favour of a near reversioner bars the claim of a reversioner equally entitled.

6th Dec. 1902.

The Courts below have differed, the first Court holding that the widow had no power to act at all and could give nothing but her life interest, whilst the Divisional Judge held that, as the gift had been carried out with the knowledge and consent of plaintiff's father and other relations, and as some time had been allowed to elapse, it should stand.

Petitioner relies on *Jivan Singh v. Misri Lal* (1), *Harvans Singh v. Harnam Singh* (2), *Murad v. Mussammat Jannat* (3), and the remarks contained in Section 68 of Sir William Rattigan's Digest. Respondent relies on *Mussammat Fatteh Bibi v. Allah Bakhsh* (4), *Gharib Khan v. Mirza Ali Bahadar Khan* (5) and *Jumma v. Imam Bakhsh* (6), and on the unpublished rulings referred to by the Divisional Judge.

I have seen all these rulings and considered their bearing on the present case. *Mussammat Mana's* action in preferring *Hira Singh* and making him her husband's heir with the assent of collaterals bears a great resemblance to the adoption of a son by a Hindu widow on whom her husband has enjoined the duty of adoption. In the present case, although no adoption is alleged in the deed itself, a similar idea seems to have been in the mind of the widow, and *Hira Singh* had evidently lived with her and her husband as a son. There does not seem to be any doubt that, if the gift had been made in *Hira Singh's* favour during the lifetime of her husband with the consent of plaintiff's father and other near reversioners, plaintiff's claim could not have succeeded. But whether the widow had the power to do what her husband

(1) *L. L. R.*, XVIII All., 146, P. C.

(2) *84 P. R.*, 1898, F. B.

(3) *67 P. R.*, 1900.

(4) *84 P. R.*, 1900.

(5) *7 P. R.*, 1893.

(6) *138 P. R.*, 1889.

might have done is questionable. Para. 68 of Sir William Rattigan's Digest tends to show that, even in case of a sale by a widow, it is advisable for the purchaser to secure a valid assent by all reversioners who may be interested. In the case of a widow claiming the power to gift absolutely with the assent of reversioners the *onus* of proof rests heavily on the person who seeks to maintain such an alienation contrary to the usual custom which restricts the widow's power to alienate to the term of her life tenure.

I have referred to the rulings of this Court, *viz.*, the cases of *Roshan v. Dulla*, Civil Appeal No. 700 of 1898, but I do not think it can be taken as governing the present case.

There has not been any inordinate delay in suing, as mutation in Hira Singh's favour was not effected till 1895 and suit was brought in 1900. Hira Singh was apparently entitled to one-half of the land in any case. I am not prepared to hold that the principle of estoppel can possibly apply in the present case. The case of *Jhanda v. Rup Chant*, Civil Appeal No. 1007 of 1898, cited by the Divisional Judge, and *Jumma v. Imam Bakhsk* ⁽¹⁾, are relevant in this connection, but the doctrine of estoppel by witnessing a deed calls for very careful application.

Harvans Singh v. Harnam Singh ⁽²⁾ lays down the principle that any person descended from the ancestor common to himself and to the last male holder of the land in dispute can come in and claim his rights, and in the present case I am unable to see any special circumstances which would exclude plaintiff from thus intervening.

On the whole I think the action of the widow was not in accordance with custom and that the claim should be allowed. I therefore allow the revision, set aside the order of the lower Appellate Court and restore that of the first Court. Petitioner to get his costs in this Court and in lower Appellate Court, and costs of first Court as ordered therein.

Application allowed.

⁽¹⁾ 138 P. R., 1889.

⁽²⁾ 84 P. R., 1898.

Full Bench.

No. 48.

*Before Sir William Clark, Kt., Chief Judge, Mr. Justice
Chatterji and Mr. Justice Harris,*

MUSSAMMAT BANO,—(DEFENDANT),—APPELLANT,

Versus

FATEH KHAN AND ANOTHER,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1387 of 1899.

*Custom—Alienation—Distinction between gifts inter vivos and wills
among Punjab agriculturists.*

Held, by a majority (Clark, C. J., dissenting) that the distinction under Punjab Customary Law between power of gift *inter vivos* and power of testation is a matter of degree and form only, and where power of gift is shown to exist an initial presumption arises that there is a co-extensive power of testation.

Per Clark, C. J., contra, that under the Punjab Customary Law there is a marked distinction between the power of gift and the power of will, and that though the existence of a power of gift is a strong point in favour of the party asserting a power of will, it is not sufficient to relieve him of the onus of proving the existence of the latter.

Pertab Singh v. Bishen Singh ⁽¹⁾, *Ganesha v. Ganpat* ⁽²⁾, *Ali Muhammad v. Dulla* ⁽³⁾, *Anokha v. Mohan Lal* ⁽⁴⁾, *Tagore v. Tagore* ⁽⁵⁾, *Mussamat Ghulam Fatima v. Mussammam Magsudan* ⁽⁶⁾, *Kesar Singh v. Sundar Singh* ⁽⁷⁾, *Rahmat v. Azimulla* ⁽⁸⁾, *Kalander Khan v. Ata-ulla* ⁽⁹⁾, *Shad Ali Khan v. Abdul Ghafur Khan* ⁽¹⁰⁾, referred to.

Suchet Singh v. Banka ⁽¹¹⁾, *Umar v. Mussammam Sahib Khatun* ⁽¹²⁾, *Fatta v. Bakhra* ⁽¹³⁾, *Mukarrab v. Fatta* ⁽¹⁴⁾, *Shad Ali Khan v. Abdul Ghafur Khan* ⁽¹⁵⁾, and *Sukha v. Amira* ⁽¹⁶⁾, considered and disapproved.

*Further appeal from the decree of Kazi Muhammad Aslam, C.M.G.,
Divisional Judge, Jhelum Division, dated 15th August 1899.*

Duni Chand, for appellant.

Roushan Lal, for respondents.

⁽¹⁾ 81 P. R., 1877.⁽²⁾ 198 P. R., 1889.⁽³⁾ 26 P. R., 1901.⁽⁴⁾ 2 P. R., 1870.⁽⁵⁾ 9 Beng. L. R., 377.⁽⁶⁾ 69 P. R., 1890.⁽⁷⁾ 59 P. R., 1889.⁽⁸⁾ 34 P. R., 1884.⁽⁹⁾ 44 P. R., 1897.⁽¹⁰⁾ 80 P. R., 1901.⁽¹¹⁾ 90 P. R., 1891.⁽¹²⁾ 76 P. R., 1892.⁽¹³⁾ 15 P. R., 1895.⁽¹⁴⁾ 88 P. R., 1895.⁽¹⁵⁾ 24 P. R., 1898.⁽¹⁶⁾ 81 P. R., 1893.

This was a reference to a Full Bench to consider the questions whether under Punjab Customary Law there is a distinction between power of gift *inter vivos* and, power of testation, and whether if there be any distinction a power of testation should be presumed where a power of gift is shown to exist.

The order of reference was as follows :—

16th Jan. 1903.

HARRIS, J, (*Chatterji J.*, concurring).—On the 8th December 1890 Mirbaz, a sonless Awan of the Khushab Tahsil in the Shahpur District, died leaving a widow and two unmarried daughters. On the 5th December 1890 Mirbaz executed a deed described therein as a will and a deed of gift, but which we must interpret as a will, with respect to ancestral land in favour of the widow, with remainder to the daughters. Mutation followed in favour of the widow, and on her death in 1893, the land was mutated in favour of the daughters. Thereafter one of the daughters, Mussammat Bano, defendant, having married, the plaintiffs, who are first paternal cousins of Mirbaz, brought the present suit for possession of the half share with Mussammat Bano (while acknowledging the right of the other daughter, Mussammat Sardaran, to hold the other half till marriage) on the ground that Mirbaz was not competent to bequeath his ancestral estate in the presence of near male collaterals. The first Court put the onus on plaintiffs to prove the invalidity of the alienation, and treating the matter as one of gift dismissed the claim on the authority of *Bakhsha v. Mirbaz* ⁽¹⁾. In appeal the Divisional Judge pointed out that the case was one of a will, and that according to the opinion of the Settlement Officer who was responsible for the *Rivaj-i-am* which is the main basis of the decision in *Bakhsha v. Mirbaz* ⁽¹⁾, there is no custom of alienation by will in the Shahpur District. The Divisional Judge held that the *onus* should have been placed upon defendant to prove the validity of the will, and after a remand giving the defendant opportunity to establish validity, the Divisional Judge found validity unproved, and decreed the claim.

In further appeal by defendant it is contended that, even if the onus was rightly placed upon defendant, it was discharged. But we are of opinion, after hearing counsel and referring to the record, that if the onus was on defendant it has not been discharged by the instances cited. The decision of Mr. Clifford in 1884 referred to in the remand proceedings was based upon a finding

⁽¹⁾ 79 P. R., 1896.

that the female in the suit had succeeded in the same manner as a full male owner would and also upon an erroneous statement of Muhammadan Law. The case of 1887 also referred to in the remand proceedings was one of Awans of the Khushab Tahsil, but the decision was based upon two published rulings *Sab-alam v. Mussammat Sarfaraz* ⁽¹⁾, and *Fazl v. Mussammat Bhagbhari* ⁽²⁾ of the Jhelum District, and a gift *inter vivos* and a will were treated on the same footing. Whether a gift and a will are to be treated alike is a question, the determination of which will, as there is ample authority in favour of the custom whereunder a gift by Mirbaz to his daughter would be valid, decide the present case. See in particular *Bakhsha v. Mirbaz* ⁽³⁾, *Anlia v. Alu* ⁽⁴⁾, *Sher Muhammad v. Phula* ⁽⁵⁾, and *Nura v. Tora* ⁽⁶⁾. It is, however, a question which, in view of the conflict of rulings of Division Benches of this Court, we feel constrained to refer to a Full Bench for decision.

We do not consider it either proper or necessary to discuss at this stage whether our opinion is for or against a distinction being drawn between gift and will. It is sufficient to here notice the principal conflicting decisions.

For distinction are the rulings *Suchet Singh v. Banka* ⁽⁷⁾ at pages 443-4, *Umar v. Mussammat Sahib Khatun* ⁽⁸⁾, *Fatta v. Bakhra* ⁽⁹⁾, *Mukurrab v. Fatta* ⁽¹⁰⁾, and *Shad Ali Khan v. Abdul Ghafur Khan* ⁽¹¹⁾. Against a distinction are the rulings *Pertab Singh v. Bishen Singh* ⁽¹²⁾, *Ganesha v. Ganpat* ⁽¹³⁾, and *Ali Muhammad v. Dulla* ⁽¹⁴⁾. The views expressed on this subject by the learned authors of the Digest of Customary Law (para. 56 (b), 6th edition) and Tribal Law in the Punjab (pages 25, 81 and 124) are also at conflict in the matter.

We therefore refer the following questions for decision by a Full Bench :—

Whether under Punjab Customary Law there is a distinction between power of gift *inter vivos* and power of testation.

Whether, if there be any distinction, a power of testation should be presumed where a power of gift is shown to exist.

(1) 122 P. R., 1884.

(2) 93 P. R., 1885.

(3) 79 P. R., 1896.

(4) 49 P. R., 1898.

(5) 9 P. R., 1899.

(6) 46 P. R., 1900.

(7) 90 P. R., 1891.

(8) 76 P. R., 1892.

(9) 15 P. R., 1895.

(10) 88 P. R., 1895.

(11) 24 P. R., 1898.

(12) 81 P. R., 1877.

(13) 198 P. R., 1889.

(14) 26 P. R., 1901.

The following opinions were recorded by the learned Judges forming the Full Bench :—

24th March 1903. HARRIS, J. —The questions for decision by the Full Bench and most of the rulings of this Court which bear on those questions, are given in the referring order.

That we have reached a stage at which, apart from the question of the validity of the alienation, the making of wills is generally known and often resorted to by the agriculturists, whether Hindu or Muhammadan, of this Province to whom customary law applies, I have no doubt whatever.

Hindu wills have been recognized in India for nearly 150 years, and have been subject of legislation since 1793.

Wills form subject of Muhammadan Law. A Hindu will was upheld by this Court so long ago as 1870 (*Anokha v. Mohan Lal* ⁽¹⁾), and the power of testation of a Hindu Jat agriculturist was contemplated by this Court in 1877 (*Pertab Singh v. Bishen Singh* ⁽²⁾). It seems that when opinions were collected prior to the passing of the Probate and Administration Act of 1881 the practice of making wills was rapidly spreading in the Punjab. (Henderson—Law of Wills in India, page 6). There are numerous reported decisions of this Court in cases of wills by agriculturists to whom the Punjab Customary Law applies. The appointment of an heir with its alternative form the association of the resident son-in-law, which is in effect a form of devise, is part and parcel of Punjab Customary Law. So it is somewhat extraordinary to find an officer engaged in drawing up a record of the customary law of a district doubting the existence of a custom of making wills which was expressly declared by the tribes from which he was making the enquiry (see remarks at page 82 of *Ali Muhammad v. Dulla* ⁽³⁾), tribes whose personal law for the most part directly recognizes testamentary devise. The validity of such an alienation is, of course, quite another matter.

With regard to the first question referred I would preface my remarks by stating my accordance with the view that wills are a natural development in times of security and civilization of the power of gift *inter vivos*. The arguments of Mr. Justice Markby in his Elements of Law (5th Edition, pages 390-91) are not to my mind convincing, and his conclusion that the practise of making wills rests "on habit and convenience, backed by

(¹) 2 P. R., 1870. (²) 18 P. R., 1877.

(³) 26 P. R., 1901.

"authority," and that "it has grown, like other law, partly out of the expressly declared will of the supreme power, partly out of judicial decision, and partly out of custom" does not seem to me to necessarily exclude the other view, any more than does the opinion expressed in Mayne's Hindu Law that the Hindu will owes its origin to religious influence. In the Tagore will case (*Tagore v. Tagore* ⁽¹⁾), their Lordships of the Privy Council say: "The introduction of gifts by will into general use has followed in India, as it has done in other countries the conveyance of property *inter vivos*," and though the view expressed in the same ruling that a will "is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries" may not meet with general acceptance, the view that wills developed out of gifts is not lightly to be departed from by Courts in India, and is one which has been adopted by this Court in *Mussammatt Ghulam Fatima v. Mussammatt Maqsudan* ⁽²⁾.

The discussion of the above question, which is more or less academical, does not, however, carry the matter far towards an answer of the first question referred to this Bench. That there is some distinction between gifts and wills under Punjab Customary Law is, I think, undoubted, and has been drawn in many rulings of this Court. But after all said and done the distinction between the two acts mainly consists in the matter of delivery of possession, provided of course that the power of testation extends no further than the power of gift. Thus in *Surjan v. Jodha* ⁽³⁾, it is said with regard to Chima Jats of the Gujranwala District, "In case of gifts to daughters, the delivery of possession in the donor's lifetime is insisted on to make the gift valid." Again in *Sukha v. Amira* ⁽⁴⁾, Plowden, J., remarks, "It by no means follows that if Makhan could make a gift in his lifetime, completed by delivery of possession he was equally competent to make a gift in the form of a bequest, deferring delivery of possession till after his death." In *Fatta v. Bakhra* ⁽⁵⁾, Rivaz, J., said "It is quite intelligible that the custom permitting a gift to a daughter or other donee, may insist upon a *bonâ fide* and irrevocable act completed during the donor's lifetime, by the immediate delivery of possession,

(1) 9 Beng. L. R., 377. (3) 34 P. R., 1891.

(2) 69 P. R., 1890. (4) 81 P. R., 1893.

(5) 15 P. R., 1895.

“and may decline to countenance a will, under guise of a gift, “not intended to operate till after the donor’s death.” The remarks in *Suchet Singh v. Banka* ⁽¹⁾, *Mukarrab v. Fatta* ⁽²⁾, and *Shad Ali Khan v. Abdul Ghafur Khan* ⁽³⁾ (where the learned Judge cites Roe and Rattigan’s Tribal Law) do not appear to me to carry the distinction much further and delivery of possession is evidence of the donor’s *bonâ fides* as he injures himself, and in a rude state of society it was meant to ensure the carrying out of the owner’s object. But now a will may be proved in the Punjab and the law will enforce a legal bequest. As to whether wills are opposed to Punjab custom we find curiously diverse opinions expressed by those well qualified to speak. Smyth, J., in *Partab Singh v. Bishen Singh* ⁽⁴⁾, says “By the custom of the “Punjab, as well as by the Hindu Law as administered in our “Courts, a Hindu Jat agriculturist may alienate his land by will “to the same extent that he is empowered to alienate it by gift “*inter vivos*.”

Mr. Justice Roe in Tribal Law in the Punjab at page 81 says, “The idea that a proprietor can dispose of his estate by will is “utterly repugnant to all the principles of Tribal Law,” and at page 124 of the same work “power of altering the devolution “of ancestral property by will is not only unknown, but is necessarily opposed to the fundamental principles of the Customary “Law.” The learned author seems to regard Customary Law as an invariable quantity. Sir William Rattigan in his Digest of Customary Law, 6th edition, page 75, remarks “But although “the power of testation is a later development than the power of “alienation *inter vivos*, yet where the latter is once clearly and “fully recognized in a community, the introduction of the former “is inevitable, and is soon acquiesced in as a necessary element “in the law of property.” And the author points to the remark by Mr. Justice Roe himself in *Kesar Singh v. Sundar Singh* ⁽⁵⁾ that “it has been the practice of this Court to enquire first whether “there was any general power of alienation, and if it was found “that there was, to treat the form, under which it was made, “immaterial.”

Gift to a stranger is “surely as utterly repugnant” to the agnates as is a bequest.

I agree with the view expressed in *Ali Muhammad v. Dulla* ⁽⁶⁾, that the distinction between power of gift *inter vivos* and power of

(1) 90 P. R., 1891.

(2) 81 P. R., 1877.

(3) 88 P. R., 1895.

(5) 59 P. R., 1889.

(5) 24 P. R., 1898.

(6) 26 P. R., 1901.

testation "is a difference rather in degree than in kind, and is the "result of the greater uncertainty in the one case than in the other." Before the intrusion of the agnatic principles which have so long permeated the rulings of this Court it was said (*per Fitzpatrick, J.*, in *Partab Singh v. Bishen Singh* ⁽¹⁾) "I think that a "Hindu Jat can make any transfer by will which he could make "by gift *inter vivos*. It need hardly be said that this view "is that most in accordance with reason and common sense, and "the ideas prevalent among the people themselves. The agricul- "turists of this Province no doubt are not much given to making "wills, but I think I may safely say that they would be utterly "unable to comprehend why a man might not alienate his pro- "perty by a will to the same extent as he might by a gift *inter vivos*. The distinction between a gift and a will, which is so "clear to the mind of a lawyer, would seem to them a distinction "without a difference," and after the agnatic principle was well recognized a learned Judge of this Court remarked: "In the Pun- "jab, among certain agricultural communities, land is regarded "as rather the property of the tribe or family than of the imme- "diate incumbent, and on this principle his power of alienation "of his own free will is often restricted. This, however, is a "perfectly intelligible ground, and applies equally to transfers "made during life as well as to those to take effect after death. "But when no such objection exists, we are unable to see that, in "the absence of a custom affirmatively proved, absolutely pro- "hibiting the making of wills at all, we can hold a will invalid, "simply because such dispositions of property were never made "before by any member of the tribe or community to which "the testator belonged" (*per Chatterji, J.*, in *Ganesha v. Ganpal* ⁽²⁾), with the above view, which seems to have been in some measure departed from by the learned Judge in *Mukarrab v. Fatta* ⁽³⁾, and *Shad Ali Khan v. Abdul Ghafur Khan* ⁽⁴⁾, I entirely agree in its bearing on both the questions referred to this Bench. Neither common sense nor convenience, which form the main basis of law, dictates in a civilized community a distinction between the two kinds of alienation except in the matter of form. And though, to pass to the second question referred, it is not to be assumed that one power necessarily implies the other (*Shad Ali Khan v. Abdul Ghafur Khan* ⁽⁴⁾), I am clearly of opinion that a legal presumption from a power of gift *inter vivos* arises in favour of a power of testation of like extent other circumstances

⁽¹⁾ 81 P. R., 1877.⁽³⁾ 88 P. R., 1895.⁽²⁾ 198 P. R., 1889.⁽⁴⁾ 24 P. R., 1898.

apart. I do not go so far as to say that wills and gifts are in the case of Punjab agriculturists on exactly the same footing, and there is a good deal of force in the remarks of Benton, J., in *Suchet Singh v. Banka* (1), at pages 443-4. But as Sir William Rattigan says in his Digest of Customary Law "In most of the latter class of cases, however, an unrestricted power of alienation had not been clearly and fully recognized in the communities concerned, and where the development of the law of property has only reached this stage, the restriction on any disposition to take effect on the death of the immediate occupant of the property, is intelligible. But, as a higher stage of development is reached, the distinction between a transfer *inter vivos* and one by testamentary disposition must pass away" and where a practice of making wills has come into vogue, and the law recognises and enforces a valid bequest, there seems to me neither danger nor inconvenience in holding that a presumption arises where there is a customary power of gift *inter vivos* that a co-extensive power of testation exists. It seems to me illogical to hold otherwise.

For the above reasons I am of opinion that the questions referred should be answered thus—

1. The distinction under Punjab Customary Law between power of gift *inter vivos* and power of testation is a matter of degree and form only.
2. Where power of gift is shown to exist an initial presumption arises that there is a co-extensive power of testation.

28th March 1903.

CLARK, C. J.—The conclusion arrived at by my learned brother Harris is that where a power of gift *inter vivos* is shown to exist an initial presumption arises that there is a co-extensive power of testation.

In other words, where the power of making a will is in contest among tribes who have the power of gift, the *onus probandi* shall lie, not on the party asserting the power of will, but on the party who denies the power of will.

As instances of making and contesting wills are rare, the decision of the case will generally depend on where the *onus probandi* is thrown, and the result must ensue that wills will almost invariably be found to be valid where gifts are valid.

This is a somewhat startling departure from the existing state of the law, and is opposed to the views of most experienced Settlement Officers.

Mr. Justice Harris has quoted the leading authorities on the subject and shown what a divergence of opinion there is on the subject. I do not propose to go over that ground again. I would only remark that *Ali Muhammad v. Dulla* (1) seems to be opposed to the current of decisions of this Court for the previous ten years.

I am not able to agree in the conclusion arrived at by Mr. Justice Harris, and as authorities are divided on the subject, I propose to give some reasons on general grounds for disagreeing with him, and afterwards to remark on the entries in the *Riwaj-i-am* of certain districts.

The power of alienation by gift is exceptional and it lies upon the person asserting it to prove it, and it seems to me to lie equally heavy on such persons to prove any extensions of this exceptional power. This principle is recognized in the Customary Law of pre-emption, Courts are not allowed to presume because pre-emption prevails in one *mohalla* of a town that it prevails in the next *mohalla*, nor that because certain incidents give the right of pre-emption, that other similar incidents give the right of pre-emption. The custom has to be proved in its entirety as applicable to the particular facts of the case.

I cannot see why an exception should be made in this particular case to the general rule, that a person asserting a custom different from the law or general custom is required to prove it in all its details.

As delivery of possession is an essential element of a gift, it seems to me impossible to presume that because a gift, where this essential element occurs, is valid, a will, where it does not occur, is also valid, and it seems to me that it would be equally logical to presume that a gift without possession was valid.

In most disputes about the validity of wills the difficulty is that there are not sufficient instances either way to prove a custom. In some cases of this kind the personal law of the parties has been applied under the Punjab Laws Act. I am not myself in favour of filling up the gaps of Customary Law in this way, however if that procedure were adopted in this case, the parties would be thrown back on Muhammadan Law,

(1) 26 P. R., 1901.

and the power of willing under Muhammadan Law is considerably less than the power of gift. The presumption in favour of the power of will being the same as the power of gift is not fulfilled in the case of Muhammadan Law.

That "wills are a natural development in times of security "and civilization of the power of gift *inter vivos*" I am not prepared to dispute. I think that the Courts should favour this natural development but the Courts cannot make a custom, and one of the drawbacks to Customary Law is that its administration stereotypes objectionable customs, and prevents the introduction of changes suitable to changed conditions of life. This is an incident of following Customary Law and cannot be avoided by the Courts.

To relieve the party asserting the power of making a will from the necessity of proving the custom is in my opinion not only an abrupt departure from previous practice, but calculated to change in an important matter the existing law of the Province and practically establish the validity of wills wherever gifts are valid.

I will now refer to the entries in the *Riwaj-i-ams* and to the views of some of the Settlement Officers on the subject. I bear in mind that it is but in few districts that gifts of ancestral land are sanctioned by Customary Law, and that it is only cases where such gifts are valid that are fully analogous to the present case.

However in many districts gifts of portions of land, and gifts of acquired land, are valid, and these districts would also be affected by the presumption that if gifts were valid, wills also are valid.

Sir Charles Roe's opinion on the subject has already been quoted by Mr. Justice Harris, and where discussing the records of tribal custom, and not expressing his own opinion, he says on page 81 of his book on Tribal Law "that the almost universal "answer to the question regarding wills is, that they are utterly unknown," he then gives the few cases in which wills are recognized at all, namely in the districts of Lahore, Jhelum, Rawalpindi, Bannu, Dera Ismail Khan, Delhi, Jhang, Shahpur, Hoshiarpur and Rohtak, and a consideration of the answers there given shows how little wills are recognized even in these districts.

In the appendix giving an abstract of unpublished *Riwaj-i-ams* there are instances in many districts where the power of

will is more restricted than the power of gift, e.g., Jullundur, Kangra, Gujranwala, Jhang, Montgomery.

Mr. Tapper, on page 94, Volume III of Pnnjab Customary Law, says "the general usage of the rural population is to effect testamentary purposes, when any such are entertained, by adoption, gifts and partitions *inter viros*. The will is foreign to the indigenous system of the country, but it has been upheld by the Courts."

Mr. Gordon Walker, Ludhiana, page 72, says "wills and legacies are unknown, but the Muhammadan Jats and the Awans of tahsil Ludhiana say that a man may dispose of his moveable property by will. In no case can land be so disposed of unless, of course, in the event of all the heirs agreeing to the disposal.

"In the case of *Partab Singh v. Bishen Singh and others* (1) it is laid down by the Chief Court that the distinction between alienation by will and by a disposition *inter viros* would not be appreciated by an agriculturist"; but I respectfully venture to differ from this conclusion. I have endeavoured to show that the right of a proprietor in inherited land is considered as to a certain extent limited; and that any attempt to interfere with the reversionary rights of the natural heirs is regarded with the greatest jealousy. A gift of land to take effect during the lifetime of the donor would be, as a rule, at once contested; and the presumption against a disposition by way of will or legacy, that came to light after the death of the proprietor, would be ten times stronger. It is scarcely necessary, however, to discuss the matter further for, while the disposition of property by gift or by adoption is recognised and admitted with limitations by the land owning tribes, wills are entirely unknown.

Mr. Wilson, Shahpur, page 63, after quoting the following answer, appends a note:—

"A proprietor can make a disposition of his property to take effect after his death, but it must be made before trustworthy witnesses, and should, if possible, be in writing."

"Note.—Although this is the answer made by all the tribes there are extremely few instances of a genuine will, the disposition made being often more of the nature of a gift than of a will. There is no true custom in any tribe of making wills, and the vagueness of the answers and fewness of the instances

(1) 81 P. R., 1 7.

“shows that this is the case. The custom such as it is, is
 “entirely a new one and is contrary to the whole spirit of the
 “tribal custom. It is however growing, and appears to be least
 “rare among the Awans and the Hindus. It is, so far as it
 “exists, limited in many directions, and the power to dispose of
 “property by will in no case exceeds the power to dispose of it
 “by gift. All say that a man having agnate descendant's cannot
 “execute a will to alter the disposition of his property among
 “them after death, and the instances given are almost all of
 “cases in which a man having no sons has attempted to alter
 “the disposition of his property, so as to divert it from the
 “agnate heirs to other relatives, such as daughters, daughters'
 “husband or daughters' sons. In some of these cases the will
 “has not been acted on, in others it has been wholly or partially
 “carried out, generally because the agnates did not think it
 “advisable to fight the case to the bitter end
 “ The fact is, as above said, that there is nowhere
 “any true custom of making wills and that if the true spirit
 “of tribal custom is to be followed, no will should in any
 “circumstances be held binding on the heirs.”

The remarks of Mr. Wilson are valuable because this case is one of Awans of Shahpur. It has been urged that the remarks of the Settlement Officer are of small value as compared with the answers of the zamindars. I do not agree in this view, the remarks seems to me as valuable as the remarks of a judicial officer who has examined witnesses in a case on the value of their evidence. Such remarks are also usual in these compilations.

Mr. Kensington, Umballa, Customary Law, page 28, says:—

“The replies given are, as a rule, curiously wide of the mark
 “and are in themselves quite sufficient evidence of the fact that
 “wills are never made and that the nature of a will is not
 “understood. If their recorded statements could be trusted
 “a majority of the tribes would agree that wills either oral or
 “written could be made, so as to defeat the rights of the heirs.
 “It was abundantly clear at attestation that nothing was further
 “from their intention.”

Mr. F. A. Robertson, Customary Law, Rawalpindi, page 17, says:—

Question 38.—“Can a testamentary disposition of property
 “be made only with the consent of the heirs, or contrary to their
 “wishes?”

“This is a very doubtful point, and I should hesitate to say that any clearly defined custom had been made out in the case of any tribe.

“The Gakhars’ reply is that a man can make a testamentary disposition of property without the consent of his heirs; but I am quite certain that if a case were to arise, the heirs would not agree to this view, if a large share of the property were so treated. At present each person asked the question thinks only of increasing his own powers upon his estate, and answers accordingly. The Khattars, Johdras, Pathans, Rujputs, Awans, Koreshis, Jats, Gujars, Malliars, Hindus and Bhabras give the same reply as the Gakhars. Dhunds, Dhanials, Jasgam and Moghals repudiate all powers of making wills,” and it is to be noted that Gakhars, Pathans, Rajputs, Jasgams, Jats, Awans, Malliars, Hindus and Bhabras and the Dhanials of the plains stated that when there were no sons, the owner of an estate could make a gift of the whole or any part of his estate without the consent of his collaterals.

Mr. W. S. Talbot, *Jhelum, Customary Law*, pages 53—54, shows a great difference of opinion among the various tribes as to powers of bequest. Mr. Talbot appends the following note:—

“It will be observed that judicial decisions notwithstanding, no tribe admits an unlimited power of bequest as regards ancestral land, few admit it even as regards non-ancestral land, and a limited power of bequest of ancestral land is asserted only by a section of the Gakhars and Janjuas, some of the Jats and the Shekhs and Phaphras.

“The custom of bequest is one of the most fruitful sources of litigation, where it exists at all, it is, I believe, a new development due to an incorrect entry in the old *Riwaj-i-am*, which the Courts have often followed in their decisions.”

From an examination of a large number of *Riwaj-i-ams* I am of opinion that generally the power of will is much more restricted than the power of gift even where there is a power of gift.

I would answer the questions referred by saying:—

- (1) That under the Punjab Customary Law there is a marked distinction between the power of gift and the power of will.

- (2) That though the existence of a power of gift is a strong point in favour of the party asserting a power of will it is not sufficient to relieve him of the *onus* of proving the existence of the power of will under Customary Law.

31st March 1903.

CHATTERJI, J.—My learned colleagues having propounded conflicting answers to the questions referred to the Full Bench, it becomes necessary for me to decide which view I should adopt. I regret that I have not time to discuss the points for consideration at length, as it is essential that I should deliver my opinion, which is fully formed, at once, before one of my learned brothers, who is about to leave the Court, does so, as it would make the reference infructuous.

Mr. Justice Harris has in his judgment referred to a case in which so long ago as 1870 a will was upheld by this Court. Other decisions to the same purport are cited in *Ali Muhammad v. Dulla* ⁽¹⁾. There is no doubt that, except in a few cases which had special features to distinguish them, the right of the people of this Province to make wills was generally recognized by this Court in its decisions up to 1889, the validity of the will being dependent on the facts of each case. They were never rejected on the ground that wills were unknown to Customary Law and opposed to it. This was distinctly said in *Sukha v. Amira* ⁽²⁾, and upheld in later decisions. The strongest statement to this effect is that given at page 124 of Roe and Rattigan's Customary Law. It is therefore right to say that these later decisions changed the current of the earlier ones and set it against the recognition of wills, until *Ali Muhammad v. Dulla* ⁽¹⁾ was passed, which naturally has tended to turn it again in the former direction.

The law of wills may not have been developed in Europe directly from the law relating to gifts, but gifts and wills are intimately connected, so that it is difficult to conceive of a power of will without the power of gift being postulated. What a man is not competent to give away during life he can hardly be deemed to be competent to give away after his death. In India wills have been declared to be developed out of gifts by the high authority of the Privy Council, and this view is accepted in *Mussammatt Ghulam Fatima v. Mussammatt Maqsoodan* ⁽³⁾, and I agree with Mr. Justice Harris that this principle ought to have due weight

⁽¹⁾ 26 P. R., 1901. ⁽²⁾ 81 P. R., 1893.

⁽³⁾ 69 P. R., 1890.

in all inquiries into the question whether the power of testation exists or not. The learned Chief Judge, I also observe, is not prepared to dispute the proposition.

The agnatic principle of succession and the right of agnates to object to alienations of childless owners was recognized in several earlier decisions of this Court, but Customary Law on the subject was reduced to a system by two distinguished Judges of this Court, Sir Meredyth Plowden and Sir Charles Roe. The process began with the Full Bench ruling in *Gujar v. Sham Das* ⁽¹⁾, and may be said to have been completed when the Full Bench decision in *Roda v. Harnam* ⁽²⁾ was passed. The principles enunciated by these learned Judges have been since generally followed in the subsequent decisions of this Court, but the pronouncement made against the adoption of a daughter's son in *Ralla v. Budha* ⁽³⁾, as being against custom and that about wills being opposed to custom, have not been so readily accepted, and it is with the latter that we are now concerned.

Where the custom is positively against wills, *i.e.*, where the *Riwaj-i-am* or *Wajib-ul-arz* declares them invalid, and there are instances in which wills have been disallowed, there is of course no difficulty; nor where the right of alienation is restricted. But where there is plenary power of alienation including that of gift but a will is nevertheless declared opposed to custom though there may be no instances against it there is more reason for dissent. If such a *dictum* is pronounced merely on *a priori* principles such principles ought to be subjected to a careful scrutiny.

Now the grounds given in *Sukha v. Amira* ⁽⁴⁾ and *Fatta v. Bakhra* ⁽⁵⁾, do not go further than saying that there is a distinction between gifts during life and wills to take effect after death. But assuming that there is a distinction, how does it help to show that wills are opposed or repugnant to custom? At best the matter ought to be an open question judged from this point of view. Another ground of distinction given in *Mukarrab v. Fatta* ⁽⁶⁾ and *Shad Ali Khan v. Abdul Ghafur Khan* ⁽⁷⁾ is that in an archaic state of society there is no machinery to give effect to the donor's wish after his death where he has not carried it out during his life-time. This merely explains why

⁽¹⁾ 107 P. R., 1887, F. B.

⁽⁴⁾ 81 P. R., 1893.

⁽²⁾ 18 P. R., 1895, F. B.

⁽⁵⁾ 15 P. R., 1895.

⁽³⁾ 50 P. R., 1893, F. B.

⁽⁶⁾ 88 P. R., 1895.

⁽⁷⁾ 24 P. R., 1898.

in such a state of society a custom of testation would not at once follow upon a custom of gift *inter vivos*. But where there is a settled Government capable of enforcing the testators' wish, the ground as a ground for retarding the practice of wills loses its force.

The case cannot be put stronger than this. In the absence of actual instances we should not presume a power of testation from the existence of a power of gift. But this is very far from saying that wills are opposed to custom. The utmost we are justified in finding under such a state of things is that no custom is shown to exist. In the absence of custom the personal law of the parties is to be followed. If this is done the power of testation will have to be conceded both in the case of Hindus and Muhammadans though the rules as regards the validity of wills will be different.

But instances, however valuable they may be in proving custom, are not absolutely essential to its establishment. The sanction of a rule of Customary Law depends upon the consensus of opinion of the body of persons to whom such law applies to be bound by the rule. The expression of opinion in such a case, if it is general, is sufficient proof of such law. Suppose the members of a tribe or the residents of a locality unanimously declare that among them a childless proprietor cannot alienate ancestral property without necessity? Will the statement be disregarded if there have been no cases of such alienation? Cannot the fact of there being no alienation be held sufficient to prove the custom? The remarks of Mr. Justice Fitzpatrick in *Pertab Singh v. Bishen Singh* ⁽¹⁾, cited in Mr. Justice Harris's judgment, are also pertinent on this point.

Granted that in pre-British times wills were not common, and that there was no agency to give effect to them after the death of testators, does it follow that no note should be taken of the present state of the commonwealth? If a power of donation is known to prevail in a certain tribe, would not the donor sometimes wish to postpone the operation of his gift till after his death and the practice of making of wills thus grow up? Would not the fact that other residents of this province or of the locality who are governed by their personal law exercise that power have an effect in creating a custom of making wills? The state already recognises wills and takes measures to give effect to them, so that facility for testators' making wills and

(1) 81 P. R., 1877.

for legatees getting their legacies have greatly increased. If an agriculturist makes a will, probate or letters of administration with the will annexed can be taken out without difficulty. In a proceeding for that purpose the *factum* of the will is alone in issue and the invalidity would have to be established in a separate suit. Does not this help to evolve the custom, if it was inchoate before, and develop it?

The growth of the law of wills among Hindus in India is an excellent illustration of the principle I have stated above. "When we began to administer the law in India," says Mr. Justice Markby, "We did in fact come in contact with a people amongst whom true wills were as yet unknown; but who, in spite of their usual strict adherence to their own laws, were by no means unwilling to acquire this important extension of the rights of the present generation."—*Elements of Law*, 5th edition, Section 791. Sir William Rattigan says: "They (wills) owe their origin to the Customary Law, and were not improbably known before the advent of the British rule" (*Science of Jurisprudence*, 3rd edition, page 112). By legislative and judicial recognition the custom has developed into a binding law without any express enactment conferring the power of testation. See also Mayne's *Hindu Law*, 6th edition, pages 621-622.

This brings me to the records of custom and opinions of Settlement Officers quoted by the learned Chief Judge in his judgment. The opinions of the Settlement Officers are of course entitled to the highest respect, being those of experts and relevant under Section 48 of the Evidence Act. But it is always permissible to look into the reasons for their opinions. On the whole, I find that these records so far from being against the view that the power of will is co-extensive with that of gift and is generally found to co-exist with the latter, rather lend it some support. It must not be forgotten that as the power of gift is rather the exception than the rule among agricultural communities, the cases in which the right to make wills is found must, on the whole, be comparatively rare. Statements that ancestral property cannot be willed away contrary to the rule of descent prove nothing against the limited right to will claimed above. Taking these circumstances into consideration the instances in which the right is recognized are rather numerous than otherwise. In Lahore, Jhelum, Rawalpindi, Bannu, Dera Ismail Khan, Delhi, Jhang, Shahpur, Hoshiarpur and Rohtak wills are said to be allowed under certain circumstances. Whether the statements

accord with facts or not they do not support the proposition that wills are unknown or repugnant to Customary Law. They rather disclose a desire in the communities by which the answers are given to avail themselves of the right and in some cases a general acquiescence in the exercise of that right. They indicate stages more or less advanced in the development of the custom of making wills.

Mr. Tupper's remarks relating to testamentary dispositions being generally effected by adoption, gift or partition are doubtless true, but he admits that the will, though foreign to the indigenous system, has been upheld by the Courts. He wrote at a time when the decisions of this Court were in favour of the right of testation.

Mr. Walker's observations show that in the Ludhiana District wills were not in vogue at the time he wrote the report. Mr. Wilson, though he thinks that there is no true custom in any tribe of making wills, admits that it is growing. His limitations of the power to will are undoubtedly correct, but his opinion that no will should be held binding on heirs does not clearly distinguish between the right of testation, pure and simple, and the power of making valid dispositions of property by wills. Mr. Kensington's remarks appear to show that the questions relating to wills were either not understood or that the answers were not properly recorded, but not, I venture to think, that wills are shown thereby to be repugnant to the sentiments of the people. Messrs. Robertson and Talbot in their observations make it abundantly clear that the desire to make wills was struggling to make itself felt among the various communities treated of in their reports. The *riwaj nama* of the previous settlement of Jhelum also referred to wills and statements made therein, whether correct in fact or not, seem to show that wills were not mentioned to the people for the first time in the questions of the Settlement Officer. In fact among communities following the Muhammadan religion wills cannot be unknown though the practice of making them may be rare. I observe that Mr. Justice Robertson was one of the Judges who decided *Ali Muhammad v. Dulla* (1).

That wills are opposed to Customary Law is a sweeping remark, is, I think, shown by the fact that in the Peshawar District which is hardly more advanced than the rest of the

(1) 26 P. R., 1901.

Punjab and in which the agnatic principle is in full force, 'so much so that even the right of the widow to hold her husband's land for life has not been fully formed in some sections, of the people (see remarks in *Man Das v. Mussammatt Shah Wasim* (1), at pages 126-127 and Tupper's Customary Law, Volume 2nd, page 237), the right of alienation of the male proprietor in possession appears to be admitted in many tribes and the right of making wills in full force. See *Rahmat v. Azimulla* (2), *Kalandar Khan v. Attulla* (3), and *Shad Ali Khan v. Abdul Ghafur Khan* (4). I think these cases show the danger of deducing principles of Customary Law on purely theoretical grounds because they appear to be logical.

Is not the case of the Punjab agriculturist a parallel one to that of the Hindus of India? He may be slow in his ideas, but living as he does under a civilized Government he must progress to some extent in legal notions. Accordingly we find him struggling to acquire the right of testation as the previous decisions of this Court show. Does not the action of this Court in its later decisions stem the tide of progress and put back the custom to the state it was in at the advent of the British rule? Considering also that the right of will in all cases, where the right of gift *inter vivos* was proved was conceded in the earlier decisions, did not the later decisions inflict a hardship on testators and their legatees?

Speaking of progressive societies Sir Henry Maine says: "With respect to them it may be laid down that social necessities and social opinions are always more or less in advance of law. We may come indefinitely near to the closing of the gap between them but it has a perpetual tendency to re-open. * * The greater or less happiness of a people depends upon the degree of promptitude with which the gulf is narrowed." Ancient Law, 15th edition, page 24. The remarks of Mr. Mayne on the bearing of decisions of English Judges on the Hindu Law are also very prominent on the same subject. After speaking of the manner in which the Pandits attached to the Courts in the early days of British rule interpreted the texts of Sanskrit law with reference to the existing state of society, and pointing out that when translations of the texts became available to English Judges those opinions were set aside and the literal wording of the texts acted on, he goes on to say: "The fact really was that

(1) 44 P. R., 1896.

(2) 44 P. R., 1897.

(3) 34 P. R., 1884.

(4) 80 P. R., 1901.

"the law had outgrown the authorities. Native Judges would have recognized the fact. English Judges were unable to do so. * * The consequence was a state of arrested progress in which no voices were heard unless they came from the tomb." Hindu Law and Usage, 6th edition, page 44.

I think we should avoid this mistake by taking cognizance of actual facts instead of being swayed by theories, even though they may be strictly logical, or by considerations affecting the symmetry of the customary system. It is impossible to deny in the face of the recorded decisions that the custom of making wills is springing into existence more or less slowly in all parts of the Punjab, or to ignore the analogy between the growth of wills by custom among Hindus and their incorporation in Hindu Law, and the growth of wills among people governed by the Customary Law of the Punjab. This being so, I have no difficulty in agreeing with the following remarks in *Ali Muhammad v. Dulla* ⁽¹⁾. "While it is the duty of our Courts to respect all well established custom it is surely not to be held that progress is not to be recognized or that developments inseparable from civilization are to be rigidly disregarded. It appears to us that, seeing that testation is recognized by the law of the land where it is clearly shown that a large power of alienation exists, and that the community within which it exists asserts a corresponding power of disposition by will, the mere fact that before the introduction of law and order wills were not made because to make them was futile seeing that testators could not ensure their being carried out, is not sufficient ground upon which to hold that the custom is not recognized now." The remarks of their Lordships of the Privy Council in *Tagore v. Tagore* ⁽²⁾, and those of Lord Wensleydale in *Mirehouse v. Rennell* ⁽³⁾, cited with approval by them in their judgment at page 308, regarding the application of established legal principles to cases presenting new combinations of facts, ought to be borne in mind in this connection.

Again, what is meant by saying that wills are unknown and repugnant to Customary Law? Is it meant that all wills, among people governed by that law, are void and have no legal effect? But as already pointed out the Probate and Administration Court would admit such a will to probate if the *factum* is established, leaving the party opposing it to establish its invalidity in a separate suit. The danger of holding it void may also be illustrated

⁽¹⁾ 26 P. R., 1961. ⁽²⁾ 9 Beng. L. R., 377.

⁽³⁾ 1 Cl., and Fin., 546.

by a concrete case. Suppose a male owner governed by Customary Law, who is without agnatic relations or other heirs, leaves his land to a dear friend, or a person brought up by him from childhood who has served him through life, by will, being unwilling to part with the ownership during life. Is it meant that any stranger can forcibly possess himself of the land on the owner's death and that claim of the legatee must fail as the will is a disposition of property unknown or opposed to custom? Can this be affirmatively laid down? This is by no means an imaginary case but can happen any day. The facts of *Ganesha v. Ganpat* ⁽¹⁾ are analogous.

The necessity for delivery of possession in cases of gift is, no doubt, a point of difference between gifts and wills and is laid stress on by the learned Chief Judge. Sir Charles Roe, in his book on Tribal Law, says on this point: "Possibly if it were found that by the custom of any tribe a delivery of possession was essential to the validity of a gift *inter vivos*, it might be considered, in the absence of evidence on either side, that it was a fair presumption that it recognized wills also, but as already stated, as long as possession is essential, there can be no power of gift by will." But the true bearing of delivery of possession in cases of gift appears to be exaggerated in the above passage. Delivery of possession is necessary under the Hindu Law as well, but it has been pointed out by their Lordships of the Privy Council that there is nothing very peculiar in this as the rule holds good with reference to the donor only. A voluntary conveyance cannot be enforced if it has not been completed but once completed it becomes irrevocable. As against third parties where the donor has done all that was in his power to complete the gift the fact that possession has not been given is no answer to a suit by the donee against such party—*Kali Das v. Kunhaya Lal* ⁽²⁾. I do not think the rule as to delivery of possession in case of gifts under Customary Law is different and in a case like that decided by the Privy Council the result would not have been different had Customary Law applied. It would seem, therefore, that what is regarded as the great stumbling block in the way of wills and gifts being treated on the same footing does not offer any real difficulty in our doing so. Sir Charles Roe further says that, "The reason why their Lordships of the Privy Council 'engrafted' wills on Hindu Law was that they found nothing in that law radically opposed to them." The passage previously quoted, which follows

(1) 198 P. R., 1889. (2) I. L. R., XI Cal., 121.

this, apparently explains the difference in Customary Law which, in the opinion of the learned author, makes a similar process in respect of wills inapplicable to that law, but as shown above, the difference does not really exist.

Sir Charles Roe admits that wills may be made in respect of acquired property (page 125). If so, Customary Law is not against wills relating to such property and recognises wills so far. He appears in this passage to practically give up his position that wills are unknown or repugnant to that law, and his objection to wills would seem to have reference more to the nature of the property dealt with by wills than to the act of testation itself.

I do not fear any such evil consequences from wills and gifts being put on the same footing as is apprehended by the learned Chief Judge. As my brother Harris points out when a power of gift is admitted all the mischief is done. A gift to a stranger is surely as repugnant to the agnates as a bequest is. Possibly, as the former says, the number of gifts away from the agnates will increase if wills are permitted, but on the other hand the hardship of parting with his property in his life-time which the existing distinction entails on the owner of the property will disappear. It is the same to the agnates whether they have to contest a will or a gift. If there is no power of alienation they equally succeed whether it is made in this form or in that. If the power exists they must lose in either case. Possibly they will be better able to contest a will as the testator will not be alive to help his legatee. The reference to a greater exercise of the power in respect of acquired property, as to which a plenary right to gift is generally admitted, is disposed of by the above considerations. A community which allows adoptions and gifts cannot be materially prejudiced by the change in their customs if wills are treated like gifts.

It is true, as Mr. Justice Harris remarks, that in certain judgments of 1895 and 1898 I went back somewhat on my opinion in *Ganesha v. Gunpat* ⁽¹⁾ in which I held that wills and gifts are on the same footing. But the difference is perhaps more apparent than real. In *Ganesha v. Gunpat* ⁽¹⁾, the parties were Khattris, and I held the will to be good under Hindu Law in the absence of proof of custom that wills were prohibited among the parties' caste, the *onus* of proof of which I laid on the defendants. I, no doubt, indirectly

⁽¹⁾ 198 P. R., 1899.

expressed the opinion that objections to alienation based on tribal custom apply equally to wills and gifts. Subsequently when the current of rulings of this Court had established a distinction between wills and gifts under Customary Law, I pointed out in several judgments the essential features of that distinction, and enforced it mainly because I did not wish to create a conflict of opinion in the Court and the consequent uncertainty of title among the people. But now that a discordant note has been clearly struck in *Ali Muhammad v. Dulla* ⁽¹⁾, the matter has to be examined and decided on its own merits irrespective of mere weight of authority. I have no difficulty in acting on my former opinion which I never really abandoned but merely put aside for the sake of consistency in the Court's judgments.

The view that gifts and wills stand on the same footing as regards the *onus* of proof of their validity is opposed to the opinions of two such eminent Judges as Sir Meredyth Plowden and Sir Charles Roe, and one might well hesitate to differ from them were it not that very distinguished experts also are ranged on the other side. Mr. Justice Smyth, who was perhaps the first to bring into prominence the agnatic principle of succession and the restrictions on alienation in Customary Law in this Court and whose knowledge of that law was profound, Mr. Justice Fitzpatrick, and above all Sir William Rattigan support the doctrine that the right of testation is co-extensive with that of gift *inter vivos*. Extracts from the judgment of the two former and from the Digest of Civil Law by the latter have been given by Mr. Justice Harris and there is no occasion to repeat them here.

Of course if the indications are clear that there is absolutely no custom as respects wills, the provisions of the personal law will have to be followed. But custom is the primary rule of decision, and we are here considering a question relating to Customary Law. To say that the *onus* of proving that the rule relating to gifts is different from that relating to wills lies on the person asserting the proposition is merely to say that the probabilities are that the rule is the same for both, which seems to be borne out by what has been stated above.

To sum up I am of opinion that—

1. There is no sufficient ground for holding that wills are opposed or repugnant to the Customary Law of the Punjab however they might be rare or unknown.

(1) 26 P. R., 1901.

2. Where a custom of gift exists, a custom of making wills is likely to come into existence, and there are indications that in the Punjab among persons governed by Customary Law such a practice has been growing for a considerable time and has been recognized as not contrary to custom in many decisions of this Court.
3. The Court should keep in view the altered conditions of society after fifty years of British rule and the trend of public opinion at the present day in deciding the question whether wills are, or are not, opposed to Customary Law.
4. Analogy, common sense and considerations of general convenience appear alike to require that wills and gifts should be put on the same footing in Customary Law as they are in Hindu Law with which the former law has many affinities.

I would accordingly reply to the questions referred to the Full Bench in the terms proposed by Mr. Justice Harris.

31st March 1903.

CLARK, C. J.—The case is returned to the Divisional Bench for disposal with reference to the replies of the majority of the Full Bench.

No. 49.

Before Mr. Justice Anderson and Mr. Justice Robertson.

LAL CHAND,—(PLAINTIFF),—APPELLANT,

Versus

MUSSAMMAT THIAKUR DEVI AND OTHERS,—
(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 695 of 1900.

Hindu Law—Marriage—Marriage of a minor Hindu widow by chadar andazi—Consent of lawful guardian to such marriage necessary—Presumption of legality of marriage—Khatris of Lahore—Act XV of 1856.

Held, that among high caste Hindus, residents of cities, where a Hindu widow remarries and the parties to such marriage (claiming to take advantage of the provisions of the law enunciated by Act XV of 1856), have gone through the form of marriage known as *chadar andazi* with the full intention of constituting their union into a full and complete legal marriage and do in fact thereafter live as husband and wife, no interpretation of Hindu Law or custom forbidding such remarriage can avail to prevent such persons from contracting a legal marriage or is relevant to show that such a marriage is invalid, but in this case where the widow was

APPELLATE SIDE, }

a minor when the marriage was alleged to have been contracted, and no proper consent by her legal guardians had been given, and she herself repudiated the alleged marriage, held that the alleged marriage was not a legal and valid marriage binding her.

Although among high caste Hindus it is essential to the *factum* of a marriage that certain rites and ceremonies should be performed without which the relationship between the parties does not constitute a marriage valid, it is not necessary for the validity of a marriage by a Khatri widow that all the usual ceremonies which have to be performed in the case of a Khatri girl on her first marriage should be performed, and in such cases if the parties go through such ceremonies as they can reasonably arrange for, and clearly and unequivocally express their intention to enter into the marriage relation with each other and as a fact thereafter live together as husband and wife, such a union is a valid marriage.

Bai Diwali v. Moti Karsan ⁽¹⁾, *Lachman Kaur v. Mardan Singh* ⁽²⁾, *Brindaban Chandra Karmokar v. Chundra Karmokar* ⁽³⁾, *Fakir Ganda v. Gangi* ⁽⁴⁾, *Chanda Singh v. Me'a* ⁽⁵⁾, *Hamira v. Sundar* ⁽⁶⁾, *Lachu v. Dal Singh* ⁽⁷⁾, *Hakim v. Jagat Singh* ⁽⁸⁾, and *Pirithi Singh v. Bhola* ⁽⁹⁾, referred to. *Khushal Chand Lal Chand v. Bai Moni* ⁽¹⁰⁾, *Mul Chand Kuher v. Bhudhia* ⁽¹¹⁾, *Dina v. Karm Chand* ⁽¹²⁾, *Bhaoni v. Maharaj Singh* ⁽¹³⁾, *Brindavana v. Radhamani* ⁽¹⁴⁾, and *Narain Das v. Mussammat Gur Devi* ⁽¹⁵⁾, distinguished.

Further appeal from the decree of Rai Bahadur Lala Buta Mal, Divisional Judge, Lahore Division, dated 26th July 1899.

Ganpat Rai, for appellant.

Dhanraj Shah and Gobind Ram, for respondents.

The judgment of the Court was delivered by

ROBERTSON, J.—The facts in this case, as found by the first *17th March 1903.* Court and acquiesced in by the learned Divisional Judge, are as follows. The parties are Khatri. Mussammat Thakuri, defendant, became a widow some four years before suit, she must then have been quite a young girl. Some time after her husband's death, according to plaintiff Lal Chand, she became his mistress. On the 31st May 1897 at Ram Kund, a shrine near Rawalpindi, the ceremony of marriage by *chadar andazi* was gone through; some days afterwards the girl's parents obtained possession of her person under a warrant and took her away. The Courts

⁽¹⁾ I. L. R., XXII Bom., 509.

⁽²⁾ I. L. R., VIII All., 143.

⁽³⁾ I. L. R., XII Cal., 140.

⁽⁴⁾ I. L. R., XXII Bom., 277.

⁽⁵⁾ 73 P. R., 1897.

⁽⁶⁾ 13 P. R., 1898.

⁽⁷⁾ 93 P. R., 1896.

⁽⁸⁾ 87 P. R., 1898.

⁽⁹⁾ 29 P. R., 1883.

⁽¹⁰⁾ I. L. R., XI Bom., 247.

⁽¹¹⁾ I. L. R., XXII Bom., 812.

⁽¹²⁾ 52 P. R., 1899.

⁽¹³⁾ I. L. R., III All., 738.

⁽¹⁴⁾ I. L. R., XII Mad., 73.

⁽¹⁵⁾ 64 P. R., 1884.

have also found on the evidence that the girl was under eighteen when the suit was brought, Doctor Ccate's evidence being that about two months after the *chadar andazi* ceremony the girl was between 14 and 16, and Dr. Bielby (a lady doctor) that she was between 15 and 16; Lal Chand now sues for the custody of Mussammat Thakuri, his alleged wife.

There is no doubt that the *chadar andazi* ceremony took place, a Brahman being present and assisting in the ceremony, but the girl now says she was not a consenting party, that she was a minor and her parents did not consent, and that there was no valid marriage.

We accept the finding that the *chadar andazi* ceremony did take place, and we think that there is nothing to show that at the time the girl was not a consenting party. There were several witnesses present, one an Honorary Magistrate of Rawalpindi, and the girl's own admissions tend to show that she was a consenting party, but afterwards when with her own relations, changed her views. The plaintiff now sues for the custody of his alleged wife, and we have first to consider whether the ceremony gone through, the parties being Khatri and the girl a widow, constituted a valid marriage or not.

We must point out in the first place that both the lower Courts have a little misunderstood the effect of Act XV of 1856 in this connection. That statute was enacted, as cited in the preamble, at the instance of "many Hindus" who considered the view accepted by some forbidding remarriage to be an incorrect exposition of Hindu Law and it lays it down that—

"No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu Law to the contrary notwithstanding."

Section 5 of the Punjab Laws Act provides that (a) in question regarding . . . marriage . . . the rule of decision shall be any custom applicable to the parties . . . which has not been declared void by competent authority; (b) the personal laws of the parties . . . except in so far as such law has been altered or abolished by legislative enactment.

Section 1 of Act XV of 1856 deals specifically with both points and declares void any custom, or any interpretation of

Hindu Law forbidding the remarriage of widows, so that it is clear that where a Hindu widow desires to remarry, no custom and no interpretation of the Hindu Law can avail to prevent her from contracting a legal marriage, and this was accepted as a correct interpretation of the law by counsel for the respondent.

In cases such as those quoted in the judgment of the learned Divisional Judge, the question whether remarriage was recognized by custom was relevant as showing the intention of the parties. In endeavouring to establish the legitimacy of the children resulting from the union of a Hindu widow, if the custom could be established, that would be conclusive in favour of legitimacy. But the fact that there was a custom obtaining of going through a certain ceremony, recognized by all the brotherhood as not constituting marriage, and *not intended to constitute marriage*, would be relevant as showing that the parties did not intend to constitute their union into anything more than a kind of recognized concubinage. The judgment in *Mussamat Bundo v. Mussamat Luckmi and another* ⁽¹⁾ does not discuss the effect of Act XV of 1856, and it was assumed in that case that the form of marriage resorted to not being held to be a marriage according to custom, the parties were only united to the extent recognized by custom and only intended such a connexion.

In *Nanak v. Buz Ditta* ⁽²⁾ there was also no discussion of Act XV of 1856, and it was held that the woman whose alleged marriage was in question in that case was not a wife but a mistress; no doubt this view was correct in that case, as in many cases high caste Hindus would prefer to contract a relationship amounting to a sort of glorified concubinage rather than brave the views of their caste fellows and assert their right to marry a widow.

The judgment in *Dina and another v. Karm Chand* ⁽³⁾ is discussed lower down.

These rulings are therefore not really in point. Here we have not a case in which it is sought to set up the legitimacy of the offspring of a certain union, but a case in which the parties to a marriage are alleged to have gone through a form of marriage with the full intention of constituting their union into a full and complete legal marriage claiming to take advantage of the clear provisions of law in favour of such unions contained in Act XV

(1) 113 P. R., 1885.

(2) 5 P. R., 1893.

(3) 52 P. R., 1899.

of 1856. Clearly no interpretation of law and no custom forbidding remarriage is altogether relevant to show that the marriage is invalid; such evidence may be relevant for other purposes, as showing, for instance, what the real intention of the parties was, but it could not be sufficient to override a clear intention of the parties to enter into a *marriage as they are entitled to do by express law*.

Section 6 of Act XV of 1856 provides that whatever words spoken, ceremonies performed or engagements made on the marriage of a Hindu female, who has not been previously married, are sufficient to constitute a valid marriage shall have the same effect in the case of a Hindu widow. This, it is contended by counsel for the defendants, lays down that no marriage of a widow could be valid, unless performed in the same way as the marriage of a girl previously unmarried in the same caste; but this section clearly does not go so far. It is an enabling, not a disabling section. If this were to be held it would in many cases make the Act into a dead letter, for a widow in a community holding strictly to the view that remarriage of widows was entirely inadmissible might well find it quite impossible to have her remarriage performed with all the rites and ceremonies adopted among them in the case of a first marriage.

We will proceed to consider the authorities as to what is necessary to constitute a marriage apart from widow's marriage, as they have certainly a bearing on the point at issue which really is, "did the ceremony gone through and the engagements entered "into constitute a valid marriage."

In *Bai Diwali v. Moti Karson* ⁽¹⁾, it was laid down that where the evidence was sufficient to prove that some of the ceremonies usually performed on such occasions were performed, the presumption would be, until the contrary was shown, that all necessary ceremonies had been performed. This does not appear to be exactly in point, but in that case the marriage of a minor held to have been actually performed, was held to be complete, although without the consent of the minor's guardian.

In *Khushal Chand Lal Chandel v. Bai Moni* ⁽²⁾ all that appears to have been decided was that a marriage actually performed through the agency of the mother, in the case of a minor, was not void, because the father denied his consent, the doctrine of *factum valet* being applied. It was pointed out that the

⁽¹⁾ I. L. R., XXII Bom., 509.

⁽²⁾ I. L. R., XI Bom., 247.

marriage of his daughter was a *duty*, not merely a privilege on the part of the father under Hindu Law. This view was followed in *Mul Chand Kuher v. Bhudhia* ⁽¹⁾ in which judgment, at page 818, it is remarked, "the circumstance that remarriage is "permitted by the rules of the caste is irrelevant in the decision "of the question of the validity of the marriage."

In the judgment in *Lachman Kaur v. Mardan Singh* ⁽²⁾, it was held that evidence having been given of a marriage between one Aman Singh and the widow of his cousin, it must be held that the marriage must be presumed to be valid until the contrary was proved, and the case was returned for decision as to whether the marriage was invalid by custom by reason of the relationship of Aman Singh to the widow's former husband.

The case of *Dina and another v. Karam Chand and others* ⁽³⁾ is not in point, because in that case it was clearly found, page 247, that "It was not the intention of the parties that their union "should be marriage, and it is not really contended that there "was any other intention than that the woman should be the "dharel or concubine of Bhagat Ram."

The judgment in *Bharni v. Maharaj Singh* ⁽⁴⁾ is not much in point, it being merely held in that case that the so-called *gandharva* form of marriage really only amounted to concubinage, and was so understood and intended by the parties to it.

Much the same is to be said of the judgment in *Brindavana v. Radhamani* ⁽⁵⁾, which also dealt with a marriage in a *gandharva* form. The marriage so-called was then between a Khatri and a Sudra. Their Lordships, in that case, found that the intention to become husband and wife was wanting, and they remark at page 76, "that the marriage, if any, was not contracted "in the prescribed form, and that the intention to constitute the "relation of husband and wife, which the observance of that "form is designed to indicate, was wanting."

The judgment in *Narain Das v. Mussammatt Gur Devi* ⁽⁶⁾ does not appear to us to have a very direct bearing on this case. In that case the marriage of a young girl not completed, made by a mother in opposition to the will of the father, and itself found to be unnecessary and unsuitable, was held to be void.

Our attention was directed by counsel for the appellant to a passage at page 45 of Morley's Digest, Volume II, published in

⁽¹⁾ *I. L. R.*, XXII Bom., 812.

⁽²⁾ *I. L. R.*, VIII All., 143.

⁽³⁾ 52 P. R., 1899.

⁽⁴⁾ *I. L. R.*, III All., 738.

⁽⁵⁾ *I. L. R.*, XII Mad., 73.

⁽⁶⁾ 64 P. R., 1834.

1849, giving the reply of the Pandits to certain questions as follows :—

10th *Question*.—Is there any particular form of marriage by the Hindu Law ?

Answer.—There are eight forms of marriage by the law.

11th *Question*.—Would a marriage be good if not celebrated according to one or other of these eight forms ?

Answer. - The eight forms are mere forms and ceremonies. The marriage is constituted by the persons saying, " I marry, &c., " and agreeing to marry. It is the contract of marriage, which is " the essence of it." In Strange's Hindu Law, Volume I, page 44, published in 1830, we have the same view. " The essence of the " rite consists in the consent of the parties (as with us, formerly, " before the Marriage Act) that is, of the man on the one hand, " and, on the other, of the father, or whoever else gives away the " bride."

In the Tagore Law Lecture, 1896, Edition, pages 100, 101, it is laid down that if a marriage is in fact established there would be a presumption in favour of there being a marriage in law.

In *Brindabun Chandra Kurmokar v. Chundra Kurmokar and another* ⁽¹⁾ it was held that where there was shown to have been a marriage, that the mother made a gift of the bride, that the nuptial rites were recited by a priest, it ought to be presumed, in the absence of anything to the contrary, that the marriage was good in law, and that all the necessary ceremonies had been performed.

In *Fakir Ganda v. Gangi* ⁽²⁾, it is laid down that, " the " marriage having taken place every presumption must be drawn in " its favour, unless and until it is clearly shown that marriages " among members of different sects are strictly prohibited."

These are the rulings quoted to us, and our attention was also called to parts of Bannerjee's Tagore Law Lectures, pages 36, 37, 38, 52, 138, &c., which we have consulted.

The rulings of this Court in regard to the customary marriages by Jats and agriculturists in this Province are not perhaps directly in point, but they have this bearing on the case, that in all the rulings, viz., *Chanda Singh v. Mela* ⁽³⁾, *Hamira v. Sundar* ⁽⁴⁾, *Lachu v. Dal Singh* ⁽⁵⁾, *Hakim v. Jagat Singh* ⁽⁶⁾,

⁽¹⁾ *I. L. R.*, XII *Calc.*, 140.

⁽²⁾ *I. L. R.*, XXII *Bom.*, 277.

⁽³⁾ 73 *P. R.*, 1897.

⁽⁴⁾ 13 *P. R.*, 1898.

⁽⁵⁾ 93 *P. R.*, 1896.

⁽⁶⁾ 87 *P. R.*, 1898.

and *Perthi Singh v. Bhola* (1), this Court has consistently taken the view that where it is shown that a man and a woman have cohabited and lived together as man and wife, with the intention *inter se* of being husband and wife, that the presumption is that their union was a marriage and valid, and their children legitimate. Stress in every case was laid upon the intention of the parties, and in some cases, as in *Ohanda Singh v. Mela*, it was held that in the marriage of a Jat with a Jhewar woman, the children would be held to be legitimate even though no ceremony even of *chadar andazi* had been gone through.

In this case the parties are not Jats, but Khattris of a village in Lahore District. The defendants repudiate the validity of the remarriage of a widow altogether, but it is urged that if that contention is impossible in face of Act XV of 1856, no marriage by a Khatri widow would be valid unless carried out with all the ceremonies usual in the case of a Khatri girl on her first marriage. It is urged in reply, and we think with great force, that to hold this would be to repeal Act XV of 1856 as regards high caste Hindus, for that a Hindu widow could never get the ceremony of marriage performed on her behalf in such a manner. It is further urged that where Hindu widow remarriage is legal under the Act, but not by custom of the caste, it is unreasonable to hold that the customary rites of that caste in the case of a first marriage are necessary to make a widow's remarriage legal under the Act. Further it is urged that the custom of the country side recognizes a distinction even where remarriage is fully recognized, between the ceremonies and incidents necessary to a remarriage and those necessary to a first marriage.

It appears to us that none of the rulings quoted to us show that any particular form of ceremony is necessary even among Khattris to constitute a marriage, or that the reply of the Pandits quoted from Morley's Digest, Volume II, page 45, is incorrect. It is not the ceremonies but the consent which constitute the marriage. What is laid down in *Brindavana v. Radhamani* (2), is that in that particular case the absence of the usual ceremonies held among the community to be essential to marriage, showed with other evidence that the parties intended concubinage and not marriage and that no marriage by consent took place. We should certainly hold that if a marriage were set up between parties of a high Hindu caste, and that certain rites and ceremonies were held essential to such a marriage, and these had been for no

(1) 29 P. R., 1883.

(2) I. L. R., XII Mad., 73.

sufficient reason omitted and something else substituted that that fact would be evidence, possibly evidence of great weight as to the *factum* of a marriage having taken place or not and as to the relationship which the parties desired to create.

But the case here is far different. Here we have a girl widow marrying in opposition to the views of her own relatives and section of the Khatri caste, with no known customary ceremonies established according to the view of the defendants. In such a case we hold that when the parties, one of whom is a Hindu widow, go through such ceremonies as they can reasonably arrange for, and clearly and unequivocally express their intention to enter into the marriage relation with each other and to live together as husband and wife, and do in fact thereafter live as husband and wife, the union is a valid marriage. In this case we should hold the ceremonies gone through and the publicity given and the measures taken sufficient to constitute a valid marriage if performed with the consent of parties competent to consent, and actually consenting to establish the relationship of marriage.

It becomes in this finding necessary to go somewhat carefully into the facts. That a ceremony intended to constitute a legal marriage, in which *chadar andazi* formed a part, was gone through, is found as a fact by both the lower Courts, is clear. It is, however, alleged that the respondent was a minor, and no parent was present, and this is the finding of both the lower Courts. As to the age of the girl at the time of her marriage the evidence is somewhat meagre. The Judge in the first Court was only concerned to decide whether she was or was not 18 years of age. The two medical witnesses say that the girl was between 14 and 16 and between 15 and 16, respectively; another Court considered the oral evidence to be of little value. According to Mayne's Hindu Law, para. 210, under Hindu Law minority terminates at 16, but there is some doubt whether this means the beginning or the end of the 16th year. In her application to the Magistrate the girl represented herself to be 18.

It appears to us, however, looking at all the circumstances of the case that the fullest and clearest proof that the girl was of an age to give a valid consent is required. She now repudiates the marriage and asserts her minority, and we cannot hold on the evidence on the record that it is affirmatively proved that she was of full age to consent. In the case of the remarriage of a Hindu minor widow also, amongst high caste Hindus we should be care-

ful to see whatever the particular ceremonies considered necessary or desirable, that the proper consent of responsible persons was fully given. The act is simply an enabling one, passed in deference to a body of solid Hindu opinion, and has to be administered with every care. Had the girl been shown to have been of full age, clearly and knowingly consenting to the ceremony as to her knowledge and intention constituting a legal marriage between her and Lal Chand, we should we think have been bound to hold that it was a legal and binding marriage. It is, however, found that the girl was a minor, and no parent or guardian was present to give consent, and therefore in this particular case we find under all the circumstances that the consent and intention on the part of contracting party competent to give and to hold it, which was necessary to the *nexus* of a valid marriage was absent; consequently there was no valid marriage, and the suit for custody cannot be maintained. The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

No. 50.

Before Mr. Justice Anderson and Mr. Justice Robertson.

AMIR CHAND,—(DEFENDANT),—APPELLANT,

Versus

RAM,—(PLAINTIFF).—

AND

RATTAN CHAND AND OTHERS,—

(DEFENDANTS).

RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 217 of 1900.

Contract Act, 1872, Section 23—Marriage—Betrothal—Barter of one girl in marriage for another—Breach of promise of marriage—Void agreement—Public policy—Measure of damages.

Held that a family arrangement of intermarriages of sons and daughters of various families known as "*hil muwaza*" amongst persons of the same class is not void as opposed to public policy, but as such arrangements are not held in the highest repute the injured party is not entitled to heavy damages on its breach.

Kahna v. Kahn Singh ⁽¹⁾, *Hira v. Bhandari* ⁽²⁾, *Waziri Mal v. Rallia* ⁽³⁾, *Jesa Ram v. Ghansham* ⁽⁴⁾, and *Mulji Thakersey v. Gomti* ⁽⁵⁾, referred to.

⁽¹⁾ 106 P. R., 1879.

⁽²⁾ 128 P. R., 1889.

⁽³⁾ 112 P. R., 1892.

⁽⁴⁾ 141 P. R., 1890.

⁽⁵⁾ I. L. R., XI Bom., 412.

Further appeal from the decree of Rai Bahadur Lala Buta Mal, Additional Divisional Judge, Jhelum Division, dated 2nd December 1899.

Dharm Das, Snri, for appellant.

Sakh Dial, Dhanraj Shah and Vishnu Singh, for respondents.

The judgment of the Court was delivered by—

7th March 1903.

ROBERTSON, J.—The facts of this very peculiar case are given in the judgments of the lower Courts and need not be repeated at length here.

It appears that some seven Khattris of Khushab, a town in the Shahpur District, arranged a number of what are known as "*til marwaza*" marriages together. The arrangements are set forth at page 2 of the paper book, and were as follows:—

- (1) Gurditta Mal, father of plaintiff, betrothed his daughter to the son of Rattan Chand.
- (2) Rattan Chand betrothed his daughter to Maya Das, son of Sham Das.
- (3) Sham Das betrothed his daughter to Atma Ram, son of Devi Ditta.
- (4) Devi Ditta betrothed his daughter to Jiwan Mal, son of Brij Lal.
- (5) Brij Lal, father of Jiwan Mal, betrothed his daughter to the son of Amir Chand.
- (6) Amir Chand betrothed his daughter to plaintiff, Ram, son of Gurditta.

Devi Ditta's daughter died and Jiwan Mal did not fulfil his betrothal contract to give his daughter to the son of Amir Chand. Amir Chand accordingly refused to give his daughter to Ram, son of Gurditta, who brought this suit for damages for breach of betrothal including all the parties to this 'round robin' marriage arrangement as defendants. It appears that plaintiff's father, Gurditta, has given his daughter in marriage to the son of Rattan Chand and Sham Das has married his daughter to Atma Ram. The other betrothals are so far unfulfilled.

A large number of rulings, *viz.*, *Kahna v. Kahn Singh* ⁽¹⁾, *Hira v. Bhandari* ⁽²⁾, *Waziri Mal v. Rallia* ⁽³⁾, *Jesa Ram v. Ghansham* ⁽⁴⁾, and *Mulji Thakersey v. Gomti* ⁽⁵⁾, were quoted to us, which we have considered, but we do not consider it necessary to discuss them at length. We are quite clear that where the only consideration for the marriage of a girl is a sum of money to be paid for her that the contract would be one void as opposed to public policy. None of the rulings contravene this view as far as we can see, and it is certainly ours. It is urged that where the only consideration is the barter of one girl for another the same view must be taken, but it is quite clear that a family arrangement amongst persons of the same class by which the family A gives a girl to be taken as a wife on equal terms into a family B, and a girl of the family B is at the same time given as a wife into family A, stands on a totally different footing from what is really the sale of a girl, the suitability of the marriage and the prospective happiness of the girl being entirely lost sight of in the latter case in view of the pecuniary gain.

In the same way in this case we find a number of Khatris, all of the same caste and community, arranging a number of marriages amongst themselves none of which are shown to be *prima facie* unsuitable or undesirable. There is nothing to show that the performance of any one of the betrothal contracts was to be made dependent on the previous performance of any of the others.

Thus Sham Das has already married his daughter to Atma Ram, although Rattan Chand has not yet married his daughter to the son of Sham Das. It appears to us, therefore, that the arrangements were made independently of each other, though at one and the same time, and that the death of any one of the contracted girls was simply a misfortune which had to be put up with by those affected. Jiwan Mal's refusal to give his daughter to Amir Chand's son therefore did not justify Amir Chand in breaking the betrothal of his daughter to Ram, son of Gurditta, and his doing so, as there was nothing which can be held contrary to public policy in the transaction, gave the plaintiff a cause of action in a suit for damages for the breach of the betrothal contract. The breach is not denied and we think the plaintiff entitled to recover damages.

(1) 106 P. R., 1879. (2) 128 P. R., 1889.

(3) 112 P. R., 1892. (4) 141 P. R., 1890.

(5) I. L. R., XI Bom., 412.

Although, however, we do not hold that the contract was void as opposed to public policy, we understand that these arrangements are not held in the highest repute, and we do not accept the suggestion that a breach of one of these arrangements is as serious a blow to the honor and feelings of the injured party as in the case of a *pun* betrothal contract, and we are not prepared to allow heavy damages. We accordingly vary the decree of the learned Divisional Judge so far as to decree damages to the amount of Rs. 200 against Amir Chand with costs throughout. The claim against the other defendants is dismissed with costs throughout and the appeal against them is dismissed with costs.

No. 51.

Before Mr. Justice Anderson and Mr. Justice Robertson.

MANGTU AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

CHUNI LAL AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 257 of 1900.

Custom—Alienation—Gift by sonless proprietor to daughter's son in presence of collaterals in the fifth degree—Hindu Zargars of Umballa City—Burden of proof—Hindu Law—Adoption—Ceremonies.

Held, that the plaintiffs upon whom the *onus* lay had failed to establish that Hindu Zargars of Umballa City in matters of inheritance were governed by custom and not by Hindu Law or that collaterals in the fifth degree were entitled to succeed to the exclusion of a daughter's son.

The burden of proof that non-agricultural Hindus in matters of alienation and succession follow Punjab Customary Law rests on the person making such an allegation.

Semle :—The necessity of ceremonies in constituting an adoption among non-agricultural Hindus discussed.

Harnaman v. Atma Ram ⁽¹⁾, *Sohnu v. Ram Dial* ⁽²⁾, *Bishan Das v. Thakar Das* ⁽³⁾ *Moti Ram v. Sant Ram* ⁽¹⁾, and *Girdhari Lal v. Dalla Mal* ⁽⁵⁾, cited.

Ralla v. Budha ⁽⁶⁾ distinguished.

⁽¹⁾ 24 P. R., 1900.

⁽²⁾ 79 P. R., 1901.

⁽³⁾ 119 P. R., 1901.

⁽¹⁾ 103 P. R., 1902.

⁽³⁾ 3 P. R., 1901.

⁽⁶⁾ 59 P. R., 1893 F. B.

Further appeal from the decree of D. C. Johnstone, Esquire, Divisional Judge, Amballa Division, dated 19th December 1899.

Lal Chand, for appellants.

Ishwar Das, for respondents.

The judgment of the Court was delivered by

ANDERSON, J.—This is an appeal from a decree of the Divisional Judge, Umballa, in which he has held that certain Hindu Zargars of Umballa City in matters of inheritance follow Punjab custom, and that reversioners in the fifth degree are entitled to a decree declaring a gift by a childless proprietor in favour of his daughter's son inoperative as regards their rights. 25th April 1903.

The decision of the Divisional Judge reversed an *ex-parte* decision which held, on plaintiff's evidence alone, that they had failed to prove *locus standi* in accordance with custom.

The grounds taken in appeal are mainly these, *viz.*, that in the case of Zargars, not being agriculturists, no initial presumption should be drawn as in the case of agriculturists against the validity of gifts to daughter's son, *cf. Ralla v. Budha* ⁽¹⁾ that the Divisional Judge, in his remand order, wrongly laid the *onus* on defendants whilst it should have been thrown on plaintiff, and that the Divisional Judge has not given satisfactory reasons for holding the property to be ancestral.

The gift which is impugned was made nearly six years before suit brought. Jawahir alleges an adoption by himself of Mangtu, the son of his widowed daughter. The Divisional Judge, in discussing the evidence recorded by the Commissioner, formed the opinion that defendants were landed in this dilemma that, if they follow Hindu Law, there being no proof tendered of ceremonies performed at adoption, there has been no valid adoption, whilst, if they follow customary law, most probably, a daughter's son is not a legitimate object for adoption if the agnates object. He found on the report of the commission that as regards gift the Zargars follow agricultural custom, which seems to mean that ancestral property cannot be gifted without assent of agnates.

We think the Divisional Judge failed to apprehend the nature of the case.

The parties are Hindus aspiring to be of the Kshatriya caste and wearing the sacred thread and, even if not generally recognized as twice-born, it is pretty certain that they would imitate

⁽¹⁾ 50 P. R., 1893, F. B

the customs of the caste immediately above them. They are not agriculturists and not even resident in a village. A daughter's son is an heir under Hindu Law and would exclude collaterals nearer than plaintiffs.

To throw the *onus* of disproving the justice of plaintiff's claim on the defendants was clearly wrong and contrary to the provisions of Section 102 of Act I of 1872. *Ralla v. Budha* ⁽¹⁾ lays down that, in the case of agriculturists, an initial presumption arises against adoption of daughter's son without assent of agnates. It has no application in the case of non-agriculturists.

The plaintiffs had therefore to prove that what had been done, *viz.*, Jowahir's declaring Mangtu to be his adopted son and making a gift in his favour, was against the custom of the caste or tribe. They offered no clear instance of any such adoption being set aside whilst several instances of such adoptions having taken place were proved by the other side. *Harnaman v. Atma Ram* ⁽²⁾, *Sohnu v. Ram Dial* ⁽³⁾, *Wishan Das v. Thakar Das* ⁽⁴⁾, and *Moti Ram v. Sant Ram* ⁽⁵⁾, all furnish authority for laying the *onus* on the reversioner when such cases are brought amongst non-agriculturists.

Mr. Ishwar Das for respondents laid some stress on the fact that the *baradari* had not been assembled to witness the alleged adoption. In this connection the remarks of Chatterji, J., in *Sohnu v. Ram Dial* ⁽³⁾ at pages 261-262 may be referred to. The learned Judge in touching on the question as to necessity of a declaration before, or acceptance by the brotherhood observes "This is required among land-holding groups. Otherwise if no ceremonies are essential and the adoption is not opposed to custom "I see no reason why a declaration by deed should not, at least "when coupled with previous and subsequent treatment, be "enough." (See also *Girdhari Lal v. Dalla Mal* ⁽⁶⁾, a case of Khattris of Ferozepore).

In this case there is no deed of adoption but a deed of gift and an assertion as to adoption, from which Jowahir cannot now go back. What his intentions are cannot be doubtful, and, if the *onus* of proving plaintiffs entitled to claim a declaration that he cannot interfere with their right of succession, rest on them and remain undischarged, it is clear that no declaratory decree

(1) 50 P. R., 1893, F. B.

(2) 24 P. R., 1900.

(3) 79 P. R., 1901.

(4) 119 P. R., 1901.

(5) 103 P. R., 1902.

(6) 3 P. R., 1901.

should be given. The first Court's order may have been summary. But its meaning is plain enough, *viz.*, that plaintiffs had no right to sue and had not shown themselves entitled to contest the gift. We see no occasion to remand the case now in order to give plaintiffs a further opportunity of making up a case. Sufficient evidence has been taken and we are fully satisfied that the plaintiffs should not obtain the decree for which they ask, inasmuch as there is no reason to believe that Jowahir's action in making a gift in favour of his daughter's son, whom he intends to treat as his adopted son and heir, has acted, in any way, contrary to law or customs. The first Court appears to have exercised a sound discretion in refusing the decree, and we are quite unable to agree in the view taken by the Divisional Judge. Setting other considerations aside, part, at least, of the property appears not to be ancestral, and we cannot follow the remark passed by the Divisional Judge in his remand order to the effect that "indirectly it is *prima facie* proved that the property is ancestral." We apprehend this should have been clearly proved.

In the view we take of the case it is however unnecessary to go into this question. For the reasons stated above we accept the appeal and dismiss the suit with costs throughout.

Appeal allowed.

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No. 52.

*Before Sir William Clark, Kt., Chief Judge, and Mr.
Justice Chatterji.*

ALI BAKHSH,—(PLAINTIFF),—APPELLANT,

Versus

MAHYA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 899 of 1899.

*Custom—Pre-emption—Kot Abdulla Shah in Mozang—District Lahore—
Punjab Laws Act, 1872, Section 11.*

*Found that the custom of pre-emption prevails in kot Abdulla Shah, a
sub-division of the village of Mozang in the Lahore District.*

Charanjit Mal v. Mussammat Mitho ⁽¹⁾ and *Ram Asra v. Gurditta* ⁽²⁾
referred to.

*Further appeal from the decree of Rai Bahadur Lala Buta
Mal, Divisional Judge, Lahore Division, dated 13th April 1899.*

Muhammad Shaffi and Sohan Lal, for appellant.

Ganpat Rai, for respondents.

⁽¹⁾ 29 P. R., 1888.

⁽²⁾ 42 P. R., 1891.

The judgment of the Court was delivered by

29th April 1903.

CLARK, C. J.—The ground may be cleared by stating that we think it is established that the house is situated in *muhalla* or *kucha* Bafindgan (*alias* Gazaran or Dhobian), a part of *kot* Abdulla Shah, and that it is not in *muhalla* Khatrian as alleged by defendants.

There are four well-known divisions of Mozang of which *kot* Abdulla Shah is one and in *kot* Abdulla Shah there are a number of smaller *muhallas* or *kuchas*.

It has been argued for defendants that the *muhallas* or *kuchas* are the sub-divisions of Mozang for the purposes of Section 11 of the Punjab Laws Act.

On a consideration of *Charanjit Mal v. Mussammat Mitho* ⁽¹⁾, and *Ram Asra v. Gurditta* ⁽²⁾, and No. 695 of 1895 we think that the sub-division should be taken to be *kot* Abdulla Shah, and not the *muhallas* or *kuchas*.

Since Mr. Parker's decision in 1882 in the case *Fazaldad Khan v. Fattah Ali*, it seems to have been accepted that the custom of pre-emption prevailed in this *kot*.

In this case Mr. Buta Mal, the Divisional Judge, holds that Mr. Parker's decision was wrong, according to later rulings of the Chief Court, as he presumed the custom to exist in *kot* Abdulla Shah because it existed in other parts of Mozang.

No doubt Mr. Parker's judgment is based to a great extent on that principle, but it is not based exclusively on that principle; it was noted that the house itself which was the subject of pre-emption had been obtained by the vendor by the right of pre-emption. Lakha, a witness, gave instances of pre-emption in *kot* Abdulla Shah.

The decision as regards the existence of the right of pre-emption in *kot* Abdulla Shah was not contested on appeal.

The existence of the custom was further confirmed by Lala Amolak Ram's decision on 14th March 1887 and again by Pandit Ram Chand's decision in 1888 in the case *Samman v. Ali Bakhsh*. The decision of Sardar Sohan Singh of 23rd December 1895 only decides that the custom had not been shown to prevail in *muhalla* Khatrian though it prevailed in *kot* Abdulla Shah.

On a consideration of the evidence, we think that there is a good deal even in the evidence of defendant's witnesses to

(1) 29 P. R., 1888,

(2) 42 P. R., 1891.

support the existence of the custom of pre-emption in *kot Abdulla Shah*.

We therefore hold that the custom of pre-emption prevails in *kot Abdulla Shah* and we accept the appeal and set aside the order of the Divisional Judge and remand the case to him under Section 562, Civil Procedure Code, for decision of the appeal.

Appeal allowed.

No. 53.

Before Mr. Justice Anderson and Mr. Justice Robertson.

GURDIT SINGH, —(DECREE-HOLDER),—APPELLANT,

Versus

HUKAM SINGH AND OTHERS, —(JUDGMENT-DEBTORS), —
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 404 of 1903.

Pre-emption—Decree for pre-emption omitting to state consequence of non-payment of pre-emptive price within the time prescribed thereby for payment—Civil Procedure Code, 1882, Section 214.

Held, that a pre-emption decree becomes void and inoperative if the pre-emptive price is not paid within the time prescribed for its payment in the decree. An omission in the decree of any order as to what would be the consequence of the decree-holder's default in payment of the pre-emptive money does not in any way affect the case.

Jai Kishen v. Bhola Nath ⁽¹⁾ followed.

Further appeal from the decree of Maulvi Muhammad Hussain, Divisional Judge, Lahore, dated 25th June 1902.

Durga Das, for appellant.

Shahab-ud-din, for respondents.

The judgment of the Court was delivered by

ANDERSON, J. —This matter comes before us on revision for *25th April 1903*. decision of the question whether a pre-emption decree became void after the expiry of the period fixed for payment though no condition was added providing that the decree should, in the event of such failure, lapse and become void, the suit to stand dismissed.

⁽¹⁾ *L. L. R., XII All., 529.*

The Divisional Judge, following the rule laid down in *Jai Kishen v. Bhola Nath and another* ⁽¹⁾ held that the decree had become void and the money could not properly be received after the period had run out.

It was there held that, where the decree omitted to state what would be the effect on the plaintiffs' suit of non-payment within the prescribed period, the plaintiff could not enforce his decree.

Mr. Durga Das for appellant has argued before us that, as the provisions of Section 214 of Civil Procedure Code were not complied with and no *parchn* delivered to plaintiff in accordance with the directions contained in the Chief Court Circular regarding decrees in pre-emption cases, the law should not be construed so as to deprive plaintiff of relief unless laches on his part be clearly shown.

The decree passed by the first Court (Tahsildar of Lahore) allowed two months for payment of the amount decreed. Plaintiff paid this in only four days after the lapse of the prescribed period. A very little more expedition on his part would have saved him. Laches is therefore shown.

We think that the terms of the decree were plain and that, although the directions of Section 214, Civil Procedure Code, were not strictly complied with, plaintiff had no excuse for non-compliance nor was it in the power of the first Court to extend the time for payment although this, possibly, might have been extended by a Court of Appeal.

We find no ruling of this Court bearing on the point and consider the law applicable to the case has been correctly laid down by the Allahabad High Court in its ruling above referred to which we decide to follow.

The appeal is accordingly dismissed with costs, the Divisional Judge's decree being upheld dismissing the suit.

Appeal dismissed.

⁽¹⁾ *I. L. R., XIV All., 529.*

No. 54.

Before Mr. Justice Anderson and Mr. Justice Robertson.

MUHAMMAD HUSSAIN,—(DEFENDANT),—APPELLANT,

*Versus*SULTAN ALI AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 211 of 1900.

Custom—Inheritance—Shia Sayads of Umballa City—Punjab Laws Act, 1872, Section 5—Muhammadian Law.

In a suit the parties to which were non-agriculturist Shia Sayads residing in the Kazi mohalla of Umballa City and owning little land outside, held, that the plaintiffs had failed to establish that they were governed by agricultural custom under which collaterals related in the fifth degree have a right to succeed to non-ancestral house property situated in the Umballa City or cantonments to the exclusion of a grandmother succeeding her grandson, or a married daughter succeeding her mother.

Held, further, that in matters of succession under dispute the parties were governed by the Muhammadian Law and being Shia Sayads by the Imamia Code.

As the Punjab Laws Act gives equal protection to those governed by their personal law, as well as to those governed by custom, there can be no legal presumption in any case coming before a Court in the Punjab that it is to be governed by custom rather than the personal law of the parties. But in every case where a custom is set up it is the duty of the person alleging it to prove where it is not admitted that it exists and is applicable to the points in issue.

Further appeal from the decree of D. C. Johnstone, Esquire, Divisional Judge, Umballa Division, dated 8th August 1899.

Muhammad Shah Din, for appellant.

Muhammad Shafi, for respondents.

The judgment of the Court was delivered by

ROBERTSON, J.—The parties in this case are Shia Sayads residing in the city of Umballa, and the property in suit, a house and shops, is situated partly in the city and partly in the cantonment of Umballa. The property in question at one time belonged to one Rustam Ali whose position in the family is shown at page 8 in the pedigree table, after him it came to Ramzan Ali's son, Ghulam Shabir, and after him, in a manner to be discussed later on, to Mussammat Nasibau, widow of Kalandar Bakhsh, son of Rustam Ali. In 1892 Mussammat Nasibau gifted this property consisting of a house and shops to her daughter, Mussammat Husain Bibi, and shortly afterwards died. 27th Feb. 1903. !

Mussammat Husain Bibi enjoyed the property without question, and in 1898 gifted the property again to her husband, Muhammad Husain, defendant, and she also shortly afterwards died. The collaterals of Rustam Ali, who was predeceased by his son, Kalandar Bakhsh, now sue to set aside the gift by Mussammat Husain Bibi, at the same time contesting the gift by Mussammat Nasiban, and claiming possession.

The plaintiffs set up the view that the parties are governed by general agricultural custom, in virtue of which the widow, Mussammat Nasiban, merely held for life from her grandson after his death, and claim that on the death of Mussammat Husain Bibi, Kalandar Bakhsh's daughter, the property reverts to them.

The defendants, as is not uncommon in such cases where the rules governing the special class to which they belong are in a somewhat fluid state, pleaded that according to their custom the gifts in question were valid. The issues framed by the first Court are to be found at page 3 of the paper book, but the real points for decision are:—(1) Are the parties in regard to the matter in dispute governed by custom, or by their personal law, and (2) if by custom, what custom?

* * * * *

The views taken by this Court on the question have been identical throughout, there has never been any conflict or ambiguity, and the principles laid down in the rulings quoted by the Divisional Judge have been followed and emphasized in a number of later judgments, viz., *Aldul Hakim v. Mussammat Belochni* ⁽¹⁾, *Mussammat Fatima v. Arjmand* ⁽²⁾, *Mussammat Karam Bibi v. Hussain Bakhsh* ⁽³⁾, *Sheran v. Mussammat Sharman* ⁽⁴⁾, *Wishan Das v. Thakar Das* ⁽⁵⁾, *Sayad Rahim Shah v. Sayad Hussain Shah* ⁽⁶⁾, *Wazir Ali Khan v. Mussammat Asmat Bibi* ⁽⁷⁾, *Mussammat Bukht Wadi v. Sayad Khan* ⁽⁸⁾, and *Muhammad Anwarul Haq v. Habib-ul-Rahman* ⁽⁹⁾.

Briefly there is no legal presumption that any case coming before a Punjab Court is to be ruled by custom rather than personal law. The Act gives equal protection in the pursuance of their own system to those under personal law as to those under custom. In every case where custom is set up it is the duty of the person setting it up to prove its existence and its applicability

⁽¹⁾ 47 P. R., 1900.

⁽²⁾ 119 P. R., 1901.

⁽³⁾ 41 P. R., 1901.

⁽⁶⁾ 102 P. R., 1901.

⁽⁵⁾ 92 P. R., 1901.

⁽⁷⁾ 61 P. R., 1902.

⁽⁴⁾ 117 P. R., 1901.

⁽⁸⁾ 66 P. R., 1902.

⁽⁹⁾ 74 P. R., 1902.

to the point in issue, where this is not admitted. In many cases, as in the case of certain agricultural tribes, the presence of numerous concurrent judgments of this Court, and the existence of many precedents may make this a very simple matter, and may even in some cases raise a presumption of fact in its favour. But the fact that the parties are governed by custom, and further, what that custom is has to be proved as any other alleged fact on which the granting of relief depends has to be proved; and there is nothing in the law governing the subject to justify any initial preference for the rule of custom over the rule of personal law. The case has been put thus by the learned Judge, Chatterji, J., in *Mussammatt Fakhr-ul-Nissa v. Malik Rahim Bakhsh and others* ⁽¹⁾. "The person who alleges a custom contrary to some precept of his personal law is *primâ facie* bound to prove the custom. But where a rule of custom is known to be generally widely prevalent, or where it has been found to govern a particular tribe or to obtain in a particular locality in a series of judicial decisions of this Court, or where the *onus* of proof in regard to a particular custom has been laid down by a Full Bench of this Court it may be right to start with an initial presumption in favour of its existence. The fairest rule in all other cases is to leave it to be established by evidence." We think this goes quite as far as it is correct to go, and we think it clearly lies in all cases upon the party setting up a custom differing from his personal law to prove the existence of that custom by one or other of the methods of proof recognized by law and procedure. The manner in which the learned Divisional Judge has approached the question has clearly been incorrect, and this is admitted by counsel for the respondents. Farther we must remember that if no custom is affirmatively proved the rule applied to govern the case must be the personal law of the parties. If one custom is alleged by one side in their own favour, and a different custom is alleged by the other in their own favour, and neither side succeeds in proving the existence of the custom set up under Section 5 of the Laws Act, we have to fall back upon the personal law of the parties as the rule to govern the case. See *inter alia* (*Sheran v. Mussammatt Sharman* ⁽²⁾).

The parties are Shia Sayads of the Umballa City. Their connection with agriculture appears to be of the slightest, and

(1) 23 P. R., 1897. (2) 117 P. R., 1901.

they are certainly not agriculturists pure and simple, though some of the Umballa City Sayads may own some land. The plaintiffs seek relief setting up a custom as governing the parties in respect of the subject in dispute. We have simply to see whether they have proved the existence of the custom, or have succeeded in raising a presumption in their favour which the defendants have failed to rebut. That there is no initial presumption in their favour is clear. We have, therefore, to examine the evidence in their favour whatever it may consist of. In considering the question it may be admitted at once that there are many Sayads scattered about the Province who are agriculturists, and that there are many agricultural Sayads even in the Umballa District, but it by no means follows that Shia Sayads residing, and who have always resided in a city, with a special *mohalla* of their own are governed by the same custom as agricultural Sayads even of the same district. The Sayads of districts further west differ much in character from those in the east, and we do not think precedents concerning agricultural Sayads of the western districts of the Punjab of any value in this case.

We must start on our enquiry with no presumption in favour of custom, more particularly agricultural custom, as opposed to law, and with no predilection for the "agnatic theory" as governing this case. It is argued by counsel that this predilection exists far more in the minds of the Courts than in the breasts of the people; and however that may be as a general proposition we are quite unable to see any justification for the assumption that the modification in the personal law of Shia Sayads which may be found necessary as a result of their changed circumstances would necessarily proceed along lines contrary to the most characteristic portions of their personal law, which is a repudiation of even the limited recognition of the agnatic theory embodied in the Sunni law. Modifications may have been necessary to meet the changed conditions of life, but it can hardly be said that we are justified in assuming *à priori* that that modification will proceed on lines directly antagonistic to one of the principal and most characteristic portions of the personal law of the parties. We propose, therefore, to approach this case with an entirely open mind, and, in accordance with Section 5 of the Laws Act with no predilection in favour of the rule either of custom or personal law.

First we must look at the pleadings. The plaint alleges that contrary to the general custom of agriculturists one

Mussammat Nasiban had made a gift of two shops in the Umballa Cantonment and one house in the Umballa City, being ancestral property, to her daughter, Mussammat Husain Bibi, who in her turn had gifted it to her husband, Muhammad Husain, defendant. The plaintiffs, being male collaterals of Mussammat Nasiban's husband, already in possession of their agricultural land, claim the shops and house according to custom.

The written pleas are, first "traverses," then, that the property in question was not ancestral, that the parties are not bound by agricultural custom, but by the *riwaj* of the Sayads, and that according to the *riwaj* governing the family the gifts in question were good. The statement of Muhammad Husain further is to the effect that even apart from the gift by Mussammat Nasiban, Mussammat Husain Bibi would have been the heir by law of Mussammat Nasiban, and Muhammad Husain the heir by law of Mussammat Husain Bibi.

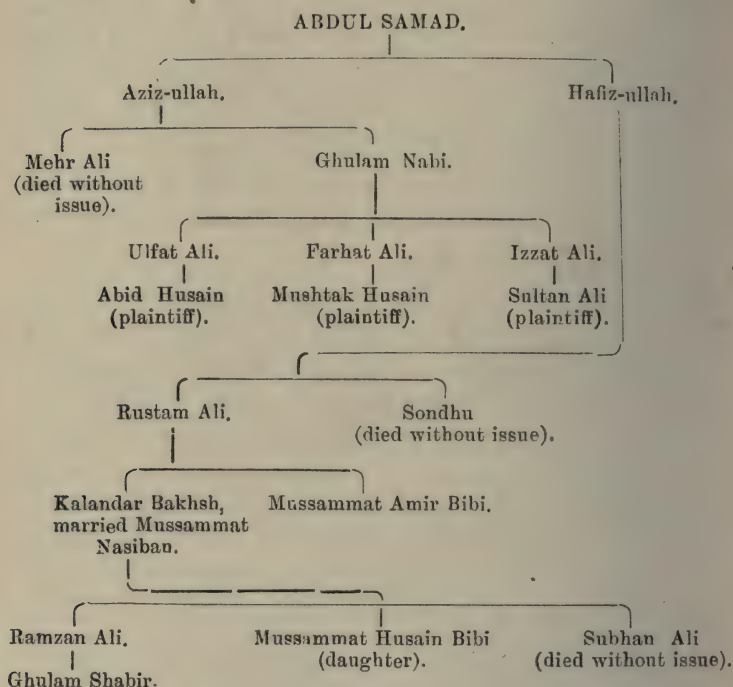
The issues drawn were not in the form best suited to the allegations and counter-allegations, but they sufficiently covered the ground.

On the pleadings it was for the plaintiffs to prove affirmatively that the parties were governed by agricultural custom, and that, according to that custom, they were entitled to succeed to the property claimed in preference to defendant. If they failed to do this, and the defendant failed to prove any special custom on his part affirmatively, the case would have to be governed by Muhammadan Law, or if the parties were found on the evidence to be governed by Muhammadan Law, modified by custom, that rule of mixed law and custom would, in accordance with the express terms of Section 5 of the Laws Act; para. (b), be the rule governing the case. It is sometimes overlooked that the law itself specifically contemplates cases which may be governed by personal law modified by custom. The issues framed are as follows:—

- (1) Is the property in dispute ancestral, and was it acquired by the common ancestor of the parties?
- (2) Are the plaintiffs entitled to sue as heirs?
- (3) Are the parties bound by custom or Muhammadan Law?
- (4) Is the alienation in question valid?
- (5) Should the alienation be proved to be unlawful, is the defendant or his widow the heir to the estate?

As regards the first issue the first Court found that the property in question is, *qua* the plaintiffs, not ancestral. Rustam Ali in his deeds of gift D1, D2 which are on the record asserted this property to be self-acquired, and we do not think that the plaintiffs have proved that it was ancestral. The lower Appellate Court considered the point immaterial. We are of opinion that the property was not ancestral.

As regards the second issue it is not now contested that the plaintiffs are collaterals of the husband of Mussammat Nasiban. The pedigree table as follows is accepted as correct by both parties:—



The third issue, on the pleadings could have been better split up as follows:—

- (1) Are the parties governed by general agricultural custom? On plaintiff.
- (2) If not, are they governed by any special custom, and if so, what custom? On defendant.
- (3) If no general or special custom is proved to govern the parties, according to the personal law of the parties who is entitled to succeed? On both.

The findings on these points govern the case, and we proceed to discuss the evidence on the record. Firstly it appears to be undisputed that there are certain rights over agricultural land which have been made over to the plaintiffs. They do not cultivate themselves, nor do any members of the immediate family hold any land in their own cultivation. Only one man out of the whole *mohalla* is said to do so, and the *biswadari* rights amounting to 5 per cent. only on the revenue are of little account. It has in several cases been pleaded that the devolution of agricultural land in the case of Shia Sayads owning land is not necessarily governed by the same rules as those governing city and other property. As an established custom this has not found favour with the Courts, but though, as pointed out, the females may not have actually lost their rights under personal law to the agricultural property, it has been found a convenient practice, and one commonly followed, to allow the agricultural land to go out of the hands of *parda nashin* ladies who could make little effective use of it, and to allow them a *quid pro quo* in other property, the principles of the Shia law being borne in mind and dominating the practice of the parties. That this occurs in actual practice, we think likely enough as it is in accordance with the dictates of practical utility and common sense, though it may be difficult or impossible to crystallize the practice into a custom having the force of law. In this particular case, seeing that there is no actual culturable land held as such by the family, and that the value of the *biswadari* rights is very small indeed, as appears from the evidence of Amir-ud-din patwari and Sher Muhammad, we think that no inference can be drawn from its possession by the plaintiffs.

We now come to the consideration of the actual property in dispute and the evidence regarding it and its disposal. We will first consider the documentary evidence on both sides, and then the oral, and then proceed to draw conclusions. Rustam Ali (see pedigree table) by a deed of gift, dated 6th July 1854, and marked D1, gifted part of his property to his grandsons Ramzan Ali and Subhan Ali. He mentions this property in suit as self-acquired, and also mentions that he has shares in other ancestral property, houses and lands, all of which he gifted to his two grandsons Ramzan Ali and Subhan Ali. By a deed of gift of 1856 he gifted part of a habitable site in the city to his only daughter Mussammat Amir Bibi.

It is pointed out that Kalandar Bakhsh, son of Rustam Ali and father of Ramzan Ali and Subhan Ali, having predeceased

Rustam Ali, under Muhammadan Law, Ramzan Ali and Subhan Ali could not have succeeded, and it is urged that it was in recognition that this rule of personal law would govern the succession that Rustam Ali disposed of all of his property, land, houses, partly ancestral and partly self-acquired, by gift to his grandsons and his own daughter. The ancestral property in fact went to the grandsons, part of the acquired property to the daughter. In D 2 Rustam Ali recites that he himself had obtained the property as his share in accordance with Muhammadan Law. It is urged that but for the gift Mussammat Amir Bibi would have succeeded to all the property excluding the grandsons.

One of the grandsons, Subhan Ali, died without issue. Ramzan Ali was succeeded by his son Ghulam Shabir. Then Ghulam Shabir died leaving a widow, a grandmother, Mussammat Nasiban, widow of Kalandar Bakhsh, and an aunt, Mussammat Husain Bibi, daughter of Kalandar Bakhsh.

When Ghulam Shabir died he was quite young, and his widow appears to have immediately re-married. The revenue authorities, as it is suggested, naturally treated the land as subject to agricultural custom, Ghulam Shabir's widow was treated as having lost her rights by re-marriage, and Mussammat Nasiban was entered as holding for life. Mussammat Khadija, Ghulam Shabir's widow, was first entered as owner, and then the Patwari, Tikan Chand, reported that Mussammat Khadija had entered into a *karewa* (*sic*) with a second husband, and that Sultan Ali and others claimed the mutation in their favour. They did not set up Mussammat Nasiban's right as widow of Kalandar Bakhsh, but contested it and the arrangement by which Mussammat Nasiban consented to hold this portion of the inheritance for life only appears to have been in the nature of a compromise. It must be noticed that before the date of this mutation, 15th June 1892, Mussammat Nasiban had been treating the property now in dispute as her own without contest. Putting aside the young widow of Ghulam Shabir, Mussammat Nasiban was under the Imamia Law the sole heir of Ghulam Shabir. As his grandmother she excluded Mussammat Husain Bibi who was Ghulam Shabir's aunt. This is clear, see Amir Ali's Imamia Law, pages 98-99, Volume II, she treated this property as her own, and gifted it on 16th February 1892 by a deed marked D 3. In this she recites that Mussammat Husain Bibi would be her heir after her death, but she passes on the property during her life by gift. Mussammat Nasiban died in August

1892 and Mussammat Husain Bibi, *her married* daughter, took possession, and retained it without dispute until she died. It is suggested for the defendant that Mussammat Nasiban succeeded on Ghulam Shabir's death as widow of Rustam Ali, but we have seen that she would have succeeded under the Imamia Law and that her right to succeed as full owner does not appear to have been disputed as regards this property by the collaterals. But it is quite clear that the succession of Mussammat Husain Bibi, a married daughter whose husband had no claim, was not in accordance with agricultural custom, and though it is now contested within the period of limitation, the fact that it was acquiesced in throughout Mussammat Husain Bibi's lifetime, for six years, points strongly to the conclusion that the plaintiffs did not believe it to be contestable. Shortly before her death Mussammat Husain Bibi gifted the property to her husband (D 17) defendant Muhammad Husain, and it is this alienation which has brought the plaintiffs into Court. It will be seen that in these transactions, with the exception of the rejection of Mussammat Khadija's claim to the rights in landed property, and the arrangement by which Mussammat Nasiban agreed to hold that for life only, there has been nothing contrary to Muhammadan Law, while there has been a distinct setting up of it by recital in his gifts by Rustam Ali, an alleged recognition of it by him in his gift to save the inheritance of his grandsons who would have been excluded by their father's previous death, and a very clear deviation from the general agricultural custom in the succession of Mussammat Husain Bibi, a married daughter of Mussammat Nasiban, to the exclusion of the collaterals.

We have dealt with this part of the evidence first as it shows what has occurred in the actual family concerned. We now proceed to deal with the plaintiffs' evidence in support of the contention that the parties are governed by the general custom of agriculturists.

First taking the documentary evidence P 5 and P 6 are mortgages by Ghulam Shabir to third persons. It is, we presume, suggested that, if strict Muhammadan Law had been followed, Mussammat Nasiban and Ghulam Shabir would have succeeded together to Ramzan Ali's property, and that, therefore, Mussammat Nasiban would have joined in the mortgages. Mussammat Husain Bibi would not have succeeded to Ramzan Ali in presence of Mussammat Nasiban and Ghulam Shabir. It appears, however, that the family of Kalandar Bakhsh's descendants were living together as a joint family and Ghulam Shabir, the

only male, may have well acted for the family, or the shops might have fallen to his share. There is nothing on the record which was brought to our notice by either side to show clearly what occurred on the deaths of Sultan Ali and Ramzan Ali, or to show that the united family had any disagreement as to their joint enjoyment of the property.

Exhibit P 8 is a copy of a judgment in which certain collaterals restrained a sonless proprietor from alienating a house in the Umballa City. These were stated to be agriculturists, and the alienation was held to be bad as without necessity. Custom was clearly followed in that case. P 9 is not important. P 10 is a copy of the *Riwaj-i-am* regarding agricultural Sayads of the Umballa District. As has been pointed out above it does not follow because agricultural Sayads are governed by agricultural custom, that Shia Sayads, non-agricultural and living in a "Kazi mohalla" of the Umballa City, are also so governed.

P 11 is a copy of a judgment in a case which came up to this Court and in which the judgment of this Court has been published as *Wujid Ali v. Latafat Ali* (1). That case is clearly distinguishable from this. It was contended that the widow was entitled to succeed to the whole of her husband's estate absolutely. No system of Muhammadan Law would in that case have given her any such right, and it was held by this Court that in the matter in dispute the parties were governed by custom, but not necessarily in all respects Jat custom, and it was held that the widow took the estate for life only. The parties were residents of Umballa City and the instance is undoubtedly, so far as it goes, in favour of the contention that the parties are ruled by some rule of custom either replacing or modifying their personal law. In this case, however, it is to be noted that the grandmother, in which relation Mussammatt Nasiban stood to Ghulam Shabir, would have succeeded to the whole as grandmother. The ruling cannot be held, as suggested by Mr. Muhammad Shafi, to be conclusive in favour of plaintiffs' claim, but it is clearly important and entitled to weight.

Exhibit P 12 is a record of mutation of agricultural land in favour of the nephews instead of a daughter of deceased. That was a village case of *mauza* Akbarpur and has no bearing on this case. P 13 is also a village case concerning agricultural land. P 14 appears to be irrelevant. P 15 also relates to succession to agricultural land in a village. P 20 is only as to the

(1) 11 F. R., 1896.

question of relationship not now in dispute. P 22 relates to agricultural land in a village. P 23 is also a case relating to agriculturists in a village in another *tahsil* Kharar.

There is a certain amount of oral evidence on behalf of the plaintiffs which we have considered, but it does not carry the case much further. There were 9 witnesses for the plaintiffs and 6 witnesses for the defendant, who all more or less support their own side. One witness for the plaintiff, Husain Ali, is said to have given 18 instances in which custom rather than Muhammadan Law was followed, but on examination they appear to be of very doubtful value.

We now turn to the documentary evidence put forward for the defendants. We have already discussed D 1 and D 2 which are important as showing that Rustam Ali clearly considered himself bound by Muhammadan Law, and asserted, with no apparent motive for stating the facts incorrectly, that he himself had succeeded according to Muhammadan Law, using the technical word "*saham*" (see D 2). He also disposed of all his property by gift; and the inference is fair that the gift to his grandsons was to avoid their exclusion by Muhammadan Law, their father having predeceased his father. D 3 and D 17 are the deeds of gift by Mussammat Nasiban to Mussammat Husain Bibi now in dispute. D 4 is not of much importance. D 5 is the copy of a judgment in a case decided by Sayad Jamal Ali on 16th April 1866. One of the parties was mother-in-law of one of the plaintiffs in this suit. In that case the parties were clearly held to be bound by Shia Muhammadan Law, Imamia and the same is the case with D 11.

These cases are mentioned by the Divisional Judge as referred to arbitration and therefore not at all valuable. As the rule of law was clearly accepted in those cases, and their reference to arbitration was merely to settle the shares which under personal law each party was entitled to, we consider them to be instances of peculiar value, being cases in which, although the parties were at issue and went into Court in assertion of their rights, they could neither of them contend that they were not bound by personal law. D 6 is a copy of a judgment passed by Sheikh Fakir Ali, Sub Judge, on 15th July 1893. The parties were Shia Sayads of this *mohalla*, and these were clearly held to be governed by Imamia Law. This was a case in which a daughter was held to have succeeded in full proprietary right to her father, and is much in point. The Divisional Judge disposes of this

case by saying that the Judge did not very well understand the principles to be applied. But there appears to have been no appeal. D 7 is a village case and is not very important: it related to Sayads of *mauza* Sarang and was decided on a special point of custom. D 8 is a copy of a judgment only important in so far that Muhammadan Law was relied on in that case. D 9 is a copy of a statement of one Bahadur Ali, a witness for plaintiff in this case, in which he stated in the case D 8 that Muhammadan Law governed the parties, whereas he now says the opposite. D 10 is a statement of the father of one of the witnesses. D 11 referred to with D 5 above. D 12 is the copy of judgment in a case in which the contest was whether Sunni or Shia Law applied, and it was held that Imamia Law governed this case. The judgment is dated 3rd March 1877. D 13 is the copy of a judgment in a case dated 24th September 1864. In this case as in D 5 and D 11 the parties, Sayads of Kaziwara, admitted that Imamia Law applied and the case was only referred to a Kazi to decide what shares according to Muhammadan Law each was entitled to. This is also a valuable instance. D 14 and D 15 are copies of the report of the Tahsildar and the order thereon by the Collector. This case is so far important that in it a daughter was allowed to succeed to her mother's land in a neighbouring village after discussion. D 16 is a copy of a judgment in a case in which Muhammadan Law was applied to Shia Sayads of Umballa city. This was in 1864. D 18 refers to a case of 1859 in which Muhammadan Law was followed, and D 19 to a case of 1858 in which Muhammadan Law was followed.

It will appear from the above that as regards the documentary evidence there is a great preponderance in favour of the contention of the defendant that he is not bound in this matter by agricultural custom, but by Imamia Law, or Imamia Law to some extent modified by custom. The learned Divisional Judge in discussing the question (page 11, line 14) has taken a somewhat superficial view; first he has entirely overlooked the most important fact that Kalandar Bakhsh predeceased his father, and next he has apparently confused the Imamia Law of succession with the Hanafi Law of succession. Thus he says: "Accordingly when Ramzan Ali died leaving a son and "a mother the latter would have got one-sixth; but she got "nothing." As a matter of fact, under Imamia Law the mother and the son would have taken one-half each, and there is no proof that Mussammat Nasiban got nothing. Nor is there any proof that on Ghulam Shabir's death his widow succeeded alone to the

property in dispute until her remarriage. The family were living together in unity, and there is no proof that one took to the exclusion of the other; indeed there is every indication to the contrary.

One point was pressed upon us by Mr. Muhammad Shafi, and that was that where a widow is found in possession of the whole of her husband's estate, the presumption is that she took only a customary life interest, and various judgments were quoted to us in support of this contention and it was urged that the views expressed in *Rahmat Husain and others v. Mussammat Fahim-un-Nissa and others* ⁽¹⁾, have not been followed in later rulings, notably in *Muhammad Anwar-ul-Haq v. Habib-ul-Rahman* ⁽²⁾. We think there is much strength in the contention that where a widow is found enjoying the whole of her husband's property to which she has succeeded on the death of her husband, particularly if that property or any substantial part of it is lauded property, *and it is shown that the widow under the personal law would have succeeded to something much less in extent*, the presumption is that the widow has only succeeded for her life. But the case is quite different when we find a woman succeeding as grandmother to an estate identical in extent with that which she would have succeeded to under Muhammadan Law. In this case under her personal law Mussammat Nasiban would have succeeded leaving aside the widow of Ghulam Shabir to the entire estate under Imamia Law, from her grandson, and there is, therefore, no presumption that, because she took the whole of it, she took it for life only.

As there is no conflict as to the proper principles to apply between any of the judgments of this Court, and as it is clear that the questions whether Shias of a large city like Umballa are governed by custom, law, or law modified by custom, and what the custom or law to be applied is must be decided on the facts of the case, we do not consider it necessary to discuss the multitude of authorities cited at length by counsel on both sides, all of which we have, however, considered.

The counsel for appellant cited *Hasan Khan v. Husain Bakhsh* ⁽³⁾, *Mussammat Sardar Bibi v. Sayal Ali Shah* ⁽⁴⁾, *Nasir-ud-din Shah v. Mussammat Lal Bibi* ⁽⁵⁾, *Rahmat Husain v. Mussammat Fahim-un-Nissa* ⁽¹⁾, *Khazan Singh v. Maddi* ⁽⁶⁾, *Kasim Ali v. Mussammat Zinat-un-Nissa* ⁽⁷⁾, *Mussammat*

⁽¹⁾ 25 P. R., 1890.

⁽²⁾ 74 P. R., 1902.

⁽³⁾ 85 P. R., 1887.

⁽⁴⁾ 4 P. R., 1888.

⁽⁵⁾ 89 P. R., 1888.

⁽⁶⁾ 122 P. R., 1893.

⁽⁷⁾ 35 P. R., 1891.

Aishan v. Muhammad Jamil (1), *Sher Muhammad Khan v. Muhammad Khan* (2), *Mussammat Pal Devi v. Fakir Chand* (3), *Mussammat Fakhar-un-Nissa v. Malik Rahim Bakhsh* (4), *Atdul Hakim v. Mussammat Bilochni* (5), *Mussammat Fatima v. Arjmand Ali* (6), *Mussammat Karam Bili v. Hussain Bakhsh* (7), *Wazir Ali Khan v. Mussammat Asmat Bibi* (8), *Mussammat Bakht Wadi v. Sayad Khan* (9), *Sheran v. Mussammat Sharman* (10), and *Wishan Das v. Thakur Das* (11).

The counsel for respondent referred to *Imam Din v. Nauu* (12), *Muhammad Anwar-ul-Haq v. Habib ul-Rahman* (13), *Mussammat Aishan v. Muhammad Jamil* (1), *Ramzan Shah v. Mussammat Shoh Begam* (14), *Sher Muhammad v. Jafir Khan* (15), *Kutba v. Mussammat Abidan* (16), *Utian Singh v. Jhund Singh* (17), *Buhawal Shah v. Mussammat Roshan* (18), *Sayad Rahim Shah v. Sayad Hussain Shah* (19), *Civil Appeal 300 of 1870, Rahmat Ali v. Mussammat Hamid-ul-Nissa* (20), *Bedhawa Singh v. Ganesha* (21), *Sayad Sultan Mirza v. Madan Mohan* (22), *Mir Mumtaz Ali v. Jawal Ali* (23), *Bunyad Ali v. Faiz Muhammad* (24), *Mussammat Bano Begam v. Sayad Ahmad Ali* (25), *Ramzan Shah v. Mussammat Shah Begam* (26), *Mussammat Umat-ul-Ala v. Mussammat Said-ul-Nissa* (27), *Abdulla Shah v. Kaim Shah* (28), *Wajid Ali v. Latifat Ali* (29), *Nubi Bakhsh v. Mussammat Zebo* (30), *Lal Mal v. Dewa Singh* (31), *Ghulam Husain v. Mussammat Fathek Bano* (32), and *Ghulam Shah v. Amir Shah* (33).

We think from the evidence on the record that it is clear that the plaintiffs have not succeeded in proving that the parties who are Shia Sayads of Umballa city, cultivating no land, living in a special Kazi mohalla of Sayads in the Umballa City, owning houses and shops within municipal and cantonment boundaries, making their living in many cases by private service and neither

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| (1) 74 P. R., 1892. | (17) 21 P. R., 1896. |
| (2) 5 P. R., 1895. | (18) 87 P. R., 1868. |
| (3) 60 P. R., 1895. | (19) 102 P. R., 1901. |
| (4) 23 P. R., 1897. | (20) 75 P. R., 1879. |
| (5) 47 P. R., 1900. | (21) 97 P. R., 1879. |
| (6) 41 P. R., 1901. | (22) 84 P. R., 1896. |
| (7) 92 P. R., 1901. | (23) 82 P. R., 1887. |
| (8) 61 P. R., 1902. | (24) 173 P. R., 1889. |
| (9) 66 P. R., 1902. | (25) 32 P. R., 1892. |
| (10) 117 P. R., 1901. | (26) 133 P. R., 1892. |
| (11) 119 P. R., 1901. | (27) 143 P. R., 1893. |
| (12) 119 P. R., 1891. | (28) 86 P. R., 1894. |
| (13) 74 P. R., 1902. | (29) 11 P. R., 1896. |
| (14) 133 P. R., 1892. | (30) 86 P. R., 1900. |
| (15) 2 P. R., 1883. | (31) 192 P. R., 1883. |
| (16) 19 P. R., 1887. | (32) 102 P. R., 1884. |
| (33) 84 P. R., 1886. | |

practising agriculture nor living by its proceeds, are governed in all matters by agricultural custom, or that they are governed by any special custom under which the plaintiffs are entitled to succeed. We think that the evidence on the record shows, that though some members of the family, or connections, when it suited them have tried to take advantage of the agricultural custom laid down by the Courts as governing agriculturists, that there is nothing to show that the main body have shown any tendency to surrender the principles of their personal law. It would appear that in practice the application of strict Muhammadan Law as regards the rules of division according to Saham and as to the management of agricultural land has been found unsuitable and inconvenient, and has been modified in practice. But we think it is not a justifiable deduction that because this had occurred the principles of their personal law have been abandoned in favour of one entirely antagonistic to it.

We may note, *en passant*, that a view very similar to that expressed here as to the effect of the custom obtaining in a neighbouring tract, on a city community of Koreshis in Bhera, was taken by Johnstone and Kensington, JJ., in a published judgment in the case of *Ghulam Shah v. Zen Shah* ⁽¹⁾.

The result is that we find that agricultural custom has not been shown to govern the case, and that the parties are governed by personal law subject to certain modifications in practice. No special custom having been proved in this case, we must, in accordance with Section 5 of the Punjab Laws Act, apply the rule of personal law which would govern the case and under that law the plaintiff's case must fail. We find that no custom has been proved to exist among the Shia Sayads of the Kazi *mohalla* of Umballa City under which collaterals related in the degree in which the plaintiffs are to Mussammat Husain Bibi, have a right to succeed to non-ancestral house property situated in the Umballa City or Cantonments to the exclusion of a grandmother succeeding her grandson, or a daughter succeeding her mother. We hold that Mussammat Nasiban succeeded to a full estate in the property in question, and that Mussammat Hussain Bibi took a full estate from her by gift to which she would have succeeded on Mussammat Nasiban's death without the gift. Mussammat Husain Bibi's estate being a full one, the plaintiffs' suit must fail. The appeal is accordingly accepted and the suit dismissed with costs throughout.

Appeal allowed.

(¹) 101 P. R., 1902,

Full Bench.

No. 55.

*Before Sir William Clark, Kt., Chief Judge, Mr. Justice Reid,
and Mr. Justice Chatterji.*

JOWALA,—(PLAINTIFF),--APPELLANT,

Versus

HIRA SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 729 of 1899.*

*Custom—alienation—Alienation by Jat proprietor without male issue
at the date of the alienation—Right of after-born son to contest such aliena-
tion on the ground of necessity.*

Held, by a majority (Clark, C. J., dissenting) that under the Punjab Customary Law a transfer by an owner who has no heir existing at the time competent to challenge it cannot be contested by a son begotten by the owner after the date of the transaction unless there was in existence at the date of the transfer some one who would challenge it and such person did not ratify it before (an) after-born son was begotten.

Sham Singh v. Sucha ⁽¹⁾, considered and approved.

Mussammat Lorendi v. Mussammat Kishen Kaur ⁽²⁾, *Mussammat Fakharunnissa v. Malik Rahim Bakhsh* ⁽³⁾, *Gujar v. Sham Das* ⁽⁴⁾, *Roda v. Harnam* ⁽⁵⁾, *Sita Ram v. Raja Ram* ⁽⁶⁾, *Mussammat Bano v. Fattah Khan* ⁽⁷⁾, *Tagore v. Tagore* ⁽⁸⁾, *Devi Ditta v. Saudagar* ⁽⁹⁾, *The Collector of Masulipatam v. Cavalry Vencata Narrainapah* ⁽¹⁰⁾, *Ilahia v. Ganda Singh* ⁽¹¹⁾, and *Lehna v. Mussammat Thakri* ⁽¹²⁾, referred to.

Further appeal from the decree of Captain G. C. Beadon, Divisional Judge, Amritsar Division, dated 16th February 1899.

Madan Gopal, for appellant.

Vishnu Singh and Rup Lal, for respondents.

This was a reference to a Full Bench made by Reid and Kensington, JJ., to consider whether a son begotten after an alienation of ancestral property by his father, can impugn that alienation, the parties being governed by custom and being Hindu Jats of the Central Punjab.

* Case No. 1422 of 1899 was also disposed of by the judgment in this case.

⁽¹⁾ 79 P. R., 1900.

⁽²⁾ 149 P. R., 1888.

⁽³⁾ 23 P. R., 1897.

⁽⁴⁾ 107 P. R., 1887, F. B.

⁽⁵⁾ 18 P. R., 1895, F. B.

⁽⁶⁾ 12 P. R., 1892, F. B.

⁽⁷⁾ 48 P. R., 1893, F. B.

⁽⁸⁾ 9 Beng., L. R., 398, P. C.

⁽⁹⁾ 65 P. R., 1900.

⁽¹⁰⁾ 8 Moo, I. A., 500.

⁽¹¹⁾ 116 P. R., 1890, F. B.

⁽¹²⁾ 32 P. R., 1895, F. B.

The order of reference was as follows:—

REID, J.—The question involved in this appeal, whether a son begotten after an alienation of ancestral property by his father can impugn that alienation, the parties being governed by custom, is of great importance. 23rd May 1902.

* *Sham Singh v. Sucha* (1), which is directly in point, is the decision of a single Judge, on appeal from the decree of one of the Judges of this Bench, which it reversed.

Counsel for the appellant contends that the distinction between Hindu Law and custom is that under Hindu Law inheritance vests by birth, while under custom it vests by the death of the owner, so that it is immaterial under custom when the heir came into existence if he is in existence at the date of the death. We refer the question stated above to a Full Bench.

The judgments delivered by the learned Judges who constituted the Full Bench were as follows:—

REID, J.—The question referred is, whether a son, begotten after an alienation of ancestral immovable property by his father can impugn that alienation, the parties being governed by custom and being Hindu Jats of the Central Punjab. The same question was referred in Civil Appeal 1422 of 1899, and both references can be disposed of together. 26th Feb. 1903.

It is admitted that, under customary law which governs the family of the alienor, the son, if born before the alienation, could attack it on the ground that it was not justified by necessity, and it is further admitted that under Hindu law, a son begotten after an alienation by his father cannot attack it on that ground.

Under Section 5 of the Punjab Laws Act 17 of 1872, in questions regarding succession the rule of decision shall be (a) any custom applicable to the parties concerned (b) the Hindu law in cases where the parties are Hindus except in so far as such law has been modified by any such custom as is above referred to.

In *Mussammatt Lorendi v. Mussammatt Kishen Kaur* (2), and *Mussammatt Fakharunnissa v. Malik Rahim Bakhsh* (3), it was held that the section lays down the rule that an inquiry should first be directed to ascertain whether there is any custom applicable to the parties in respect of matters dealt with by it and that, if one is established, it shall furnish the rule of decision to the supersession

(1) 79 P. R., 1900.

(2) 149 P. R., 1888.

(3) 23 P. R., 1897.

of their personal law, the person who alleges a custom contrary to some precept of his personal law being *prima facie* bound to prove that custom.

The contentions on behalf of the after-born son are briefly (1) that a declaration in favour of one reversioner ensures on his death in favour of all reversioners; (2) that the suit is based on the ground that the property belongs to the family having descended from an ancestor common to the members of the family; (3) that to hold that the after-born son cannot attack the alienation would entail holding that the birth of such son would validate a sale which might have been attacked by a collateral had no son been born; (4) that to hold that the after-born son can attack an alienation does not entail holding that the right of attack is kept in suspense until the son is born, inasmuch as, on the death of the alienor, the nearest heir will take, and the state of the family at the date of the attack must be considered; (5) that the after-born son takes the place of the collateral who existed at the date of the alienation. The contentions on behalf of the alienee are (1) that an alienation without necessity is void only, not voidable; (2) that there must be some one in existence at the date of the alienation to attack it; (3) that the state of the family at the date of the alienation must be considered; (4) that when a reversioner succeeds in a suit for a declaration the reversionary right is restored, and on the death of the alienor the nearest heir succeeds; (5) that in no case has the after born son the right to object to the alienation.

These contentions suggest a distinction between cases in which the sonless alienor had, at the date of alienation, no collateral who could object to the alienation, and cases in which he had such collateral.

In *Gujar v. Sham Das* ⁽¹⁾, at page 243, Roe, J., remarked :
 “ The proprietor’s own title to the land has grown up out of a
 “ state of things which renders it improbable that he possessed a
 “ power of transfer. The land came to him as a member of a
 “ village community which, at no distant period, held the whole
 “ of their lands jointly, recognizing in the individual member
 “ only a right of usufruct, that is, a right to enjoy the profits
 “ . . . of the common land actually cultivated by him and his
 “ family, and to share in those of the portion still under joint
 “ management It is not unreasonable to
 “ presume that the absence of lineal male heirs does not confer on

⁽¹⁾ 107 P. R., 1887, F. B.

“ a proprietor privileges greatly in excess of those enjoyed by
 “ his fellows. It would only be natural that in such a case the
 “ next male collateral, if within a reasonable degree of relation-
 “ ship, so near we may say, as to be looked on as a member of
 “ the same family, should take the place of the lineal heirs, and
 “ that his consent to the alienation of land, which, by the custom-
 “ ary rules of inheritance, would have descended to him, should
 “ also be necessary. The land, even when not nominally joint,
 “ is considered as belonging to the family, and the consent of the
 “ family, or, at any, rate of the members of the family most in-
 “ terested, would naturally be necessary to any transaction affect-
 “ ing it permanently We do not think that any-
 “ thing can be predicated as to the ‘ natural rights ’ of a pro-
 “ prietor. He must derive those rights either from positive
 “ written law or from customary law. It is not alleged that the
 “ Legislature has ever attempted by any act of its own to regulate
 “ a Jat proprietor’s power of disposing of his land, and his rights
 “ must therefore be derived from customary law.”

In the same case Plowden, S. J., said: “ But if the proposition
 “ be authoritatively laid down that it is to be presumed that a
 “ childless owner of ancestral immovable property has not an
 “ unrestricted power of disposition but a limited power only, the
 “ practical question remains, what are the limits? The only
 “ general answer, as it seems to me, that is possible to this question
 “ is that the only limit on his power of disposition is the right
 “ which custom may recognize in other persons, having an in-
 “ terest in the property, to restrain him Again, and
 “ this is perhaps the most important point of all—for in every
 “ instance there must be some person who seeks to interpose, or to
 “ undo or to limit the operation of the owner’s act of disposition
 “ —custom varies as to the degree of propinquity which entitles a
 “ collateral to interpose I think it will be found
 “ practically useful to go even to the short length of affirming that,
 “ as a general rule, the presumption is that a sonless land-owner
 “ has not an unrestricted power of disposition over ancestral im-
 “ movable property.”

Under the *Mitakshara* collaterals cannot limit a man’s dis-
 position of ancestral immovable property if it is not joint, and
 the rule is thus laid down by Mayne, Edition 6, Section 342:
 “ Dispositions of property by a father can of course only be
 “ objected to by those who have a joint interest with him in the
 “ property, either by joint acquisition or by birth where the

“objection is based on the latter ground it is necessary to show
“that such an interest vested in the objector at his birth, or by
“his birth. Therefore a son cannot object to alienations validly
“made by his father before he was born or begotten, because
“he could only by birth obtain an interest in property which
“was then existing in his ancestor. Hence, if at the time of the
“alienation there had been no one in existence whose assent was
“necessary, or if those who were then in existence had consented,
“he could not afterwards object on the ground that there was
“no necessity for the transaction On the other hand, if the
“alienation was made by a father without necessity and without
“the consent of the sons then living, it would not only be invalid
“against them, but also against any son born before they had
“ratified the transaction; and no consent given by them after
“his birth would render it binding upon him.”

In *Sham Singh v. Sucha* (1), Harris, J., said: “The right to
“plaintiff to object to the sale before his birth is one to which no
“alleged custom applies. It is not suggested that instances
“would be forthcoming in support of such custom, even if
“alleged. It is only in comparatively recent times that restric-
“tion on alienations has been extended to cases like the present,
“so far as customary law is concerned. We have therefore to fall
“back upon Hindu law which, though parties are Sikhs, is, in
“the absence of custom, the personal law of the parties.”

In considering the effect of applying Hindu law the distinction between the rights of the male proprietor under Hindu law and under customary law must be kept in view. Under the former he has, if he has not a son born or begotten, an unfettered right over any ancestral immovable property in respect of which his share has been separated from the shares of his collaterals. Under the latter, his dealings with such property can be controlled by his collaterals within certain degrees, the existence of such collateral having the effect of the existence of a son.

The third contention in favour of the after-born son can be met by treating an existing collateral and an after-born son as sons born before and after the alienation, and holding that the after-born can object to the alienation if it had not been ratified, before his birth, by the previously born.

The adoption of this course would render it practically immaterial in such cases whether Hindu law is applied *pro tanto*

(1) 79 P. R., 1900.

under Section 5 of the Laws Act or a custom in favour of the after-born son's power to object is held to exist.

The case of an after-born son, where no collateral existed at the date of the alienation, presents more difficulty. To hold that, if, at that date, no person with a right to interpose, or to undo, or to limit the operation of the owner's act of disposition exists, the owner may dispose of the whole of his ancestral immovable property, is to deprive the after-born son of property which would, but for the disposition, have passed to him on a title, derived from the ancestor from whom the father's title was derived.

I am not pressed by the argument that a reply in the affirmative to the question referred would render the title of a transferee from a proprietor without male collaterals or descendants insecure, and would lead to speculative transactions. The transferee is bound, in dealing with ancestral immovable property to satisfy himself as to the nature of the title derivable from the transferer and the speculative nature of the transaction is a question merely of degree.

No direct authority in favour of the after-born son has been cited, and it has been suggested that a reply in his favour will complicate the question of limitation.

In *Roda v. Harnam* ⁽¹⁾, it was held that the possession of the transferee of a male proprietor became adverse, on the death of the latter, to his collaterals. The limitation period being 12 years, the after-born son, if entitled to object, would be in the position of any other minor entitled to object. Rivaz, J., who delivered the judgment of the Full Bench, said, at page 79 of the Report: "We have already expressed our opinion that the present plaintiff *does* derive his right to possession of the land in suit from or through the last male owner. But does he derive his right to sue for possession from or through such person? In our opinion he does not, inasmuch as his right to sue for possession, in spite of the last owner's act of alienation, is derived from no individual, but from the customary rule, which places a restriction upon the owner's power of disposition of ancestral property, and renders him liable to be controlled in that respect by his collateral heirs."

This dictum does not, in my opinion, advance the arguments for and against the after-born son further than they were taken

(1) 18 P. R., 1895, F. B.

by *Gujar v. Sham Das* ⁽¹⁾, above cited. In both cases the existence, at the date of the alienation impugned, of a person entitled to impugn was assumed, and the facts of the cases did not necessitate a consideration of the question now referred. The reference should, in my opinion, be answered as follows :—

Hindu law has been modified by custom, to the extent that collaterals, who cannot object under the former can object under the latter, to transfers of ancestral immovable property, and this modification entails the result that, if a collateral or collaterals, entitled at the date of the transfer to object, has or have not ratified it before the birth of a son, such son can object to it in his own right, though he was not born at the date of the transfer, birth antedating to the begetting; but custom has not effected any modification of Hindu law, such as to empower a son, born after a transfer, to impugn it, on the ground of absence of necessity, if no person entitled to impugn it was born at the date of the transfer and Hindu law, which does not give the after-born a right to impugn the transfer under such circumstances, must be followed.

13th April 1903.

CLARK, C. J.—I am unable to agree with my learned brother Reid on the principle on which he has based his decision, that there being no custom on the subject, the case should be decided according to Hindu law.

Under Section 5, Punjab Laws Act, in questions regarding succession the rule of decision is—

- (a) any custom applicable to the parties;
- (b) Muhammadan law in cases where the parties are Muhammadans and Hindu law in cases where the parties are Hindus.

There is a peculiar customary law applicable to the parties as regards succession, and I think that gaps in this custom should and may according to law be filled up on the general principles and analogies of the customary law, and not by reverting to the Hindu law, which has never been followed by, and is entirely unknown to, the tribes following customary law, and is based on principles unrecognised by them.

If all gaps in the customary law of succession are to be filled up from the Muhammadan or Hindu law, the result must be hideous patchwork.

⁽¹⁾ 107 P. R., 1887, F. B.

As I understand the law, the parties in matters of succession generally are governed by custom, and this custom must be ascertained by the Courts, and custom can be ascertained by other ways than former precedents as will be indicated presently.

Mayne, in Chapter I, Nature and Origin of Hindu Law, discusses how far the immemorial custom of the country has been affected by Brahmanism; he says that the principle that the right of inheritance according to Hindu law is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor is true as regards Bengal but not elsewhere, that among the Hindus of the Punjab the order of succession is determined by custom and not by spiritual considerations - he sums up the discussion as follows:—"First that we should be very careful before we apply all the so-called Hindu law to all the so-called Hindus. Secondly, that in considering the applicability of that law, we should not be too strongly influenced by an undoubted similarity of usage. Thirdly, that we should be prepared to find that rules such as rules of inheritance, adoption, and the like, may have been accepted from the Brahmans by classes of persons who never accepted the principles, or motives, from which these rules originally sprung; and, therefore, lastly, that we should not rashly infer that a usage which leads to necessary developments, when practised by Brahmans, will lead to the same developments, when practised by alien races. It will not do so, unless they have adopted the principle as well as the practice. Without both the usage is merely a branch severed from the trunk. The sap is wanting which can alone produce growth."

Sir Charles Roe, on page 11 of his Tribal Law, says:—"The Hindu agriculturist of the Punjab knows nothing of caste, except as represented by his tribe. No doubt he respects the Brahmin, and calls him in and feeds him on occasions of rejoicing or sorrow, but he would never dream of referring to him or to the Hindu law for guidance in his daily life. If he has ever heard of the *Dharmshastra* at all which is very improbable, he has only done so as a Spanish peasant may have heard of the Bible, he knows nothing whatever of its contents or principles, nor could the Brahmin himself enlighten him. Mr. Ibbetsen notices some minor points, such as widow marriage, on which Hindu tradition may have slightly affected social usage, but it is perfectly certain that among the Hindu agriculturists rights on land are in no way regulated by Hindu

“law. His own customary law may have features common to the Hindu law, as well as to other early Codes, but it cannot be said to be derived from it.

“The Hindu law cannot be applied to the Hindu tribes, because they have never in fact followed, or even heard of it, and it is framed for a different state of society. But the Muhammadan law is still more inapplicable to the Muhammadan tribes.”

The practice of this Court has been, I think, to decide questions of succession, where the custom was doubtful or unknown, on the above principles and not to fall back on personal law.

Thus, in *Gujar v. Sham Das* (1), though the form of question referred was as to where the *onus probandi* lay, yet the grounds of decision were based chiefly on the nature of the property, and the opinions of leading men formed on the general principles on which the custom was based and on the records of custom, the earlier and later decisions of the Court being conflicting on the question referred.

Similarly, in *Sita Ram v. Raja Ram* (2), also a Full Bench case, where the question was as to who were the heirs of a man who had been adopted and died childless. The previous decisions of this Court were over-ruled. Sir Charles Roe said: “Where I think the published decisions go wrong is that they one and all fail to consider the *nature* of the property in dispute. A similar failure led to wrong principles being applied to the decision in cases in which a sonless proprietor’s power of alienation was in dispute. This last mistake was corrected by the Full Bench ruling of this Court *Gujar v. Sham-Das* (1), and I think that the principles therein laid down afford us the proper guide for the decision of the class of cases now before us.”

Later on he says—“It is unnecessary to discuss what would be the rule of succession under Hindu law what might be excellent law, when the estate to which succession is claimed consists of a fortune in Government securities, may be very bad law when the estate is a holding in a village community.

The case was professedly considered (1) with reference to the previous decision of this Court; (2) with reference to the general principles which govern the customs regulating succession to land in Punjab village communities.”

(1) 107 P. R., 1887, F. B.

(2) 12 P. R., 1892, F. B.

So, also, in *Musammal Bino v. Fa'eh Khan* ⁽¹⁾ where the question was, whether, where by custom a proprietor could gift his land, there was a presumption that he could also will it. The question was decided on general principles—there was held to be such presumption—the probable result being that a custom in favour of wills has been established where such custom could not have been affirmatively proved, a custom being thus established where none previously existed, and the cases not being decided by the personal law, because no custom on the point existed.

Holding, then, that the question referred is to be decided according to customary law and not by reference to Hindu law, the question remains, what is the customary law on the subject ?

The restrictions on alienations by childless proprietors may be said to have only become general after the decision of *Gujar v. Shan Das* ⁽²⁾, and cases of children unborn at the time of the alienation seeking to contest an alienation must be very rare, so we cannot expect much help from actual instances.

A new case under customary law must be decided on the same principles as a new case under law and the principles which govern the decision of such a case are stated, by their Lordships of the Privy Council in *Tagore v. Tagore* ⁽³⁾. "The law of wills has, however, grown up, so to speak, naturally, from a law which furnishes no analogy but that of gifts, and it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisprudence in new cases was stated by Lord Wensleydale in the opinion delivered by him as a Judge in the House of Lords in the case of *Mirehouse v. Rennell*, in accordance with principles generally recognised. "The case," said Lord Wensleydale, "is in some sense new, as many others are which continually occur, but we have no right to consider it because it is new as one for which the law has not provided at all, and because it has not yet been decided, to decide it for ourselves according to our judgment of what is just and expedient. Our common law system consists in the applying to new combination of circumstances those rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity, consistency, and certainty, we must apply

(1) 48 P. R., 1903, F. B. (2) 107 P. R., 1887, F. B.

(3) 9 B. L. R., 398, P. C.

“ those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise ; and we are not at liberty to reject them and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be of great importance to keep this principle steadily in view, not merely for the determination of this particular case, but for the interest of law as a science.”

In *Gujar v. Sham Das* ⁽¹⁾, it was pointed out that “ the law expressly provides for the admission in evidence of *opinions* as to matters of custom, and these opinions may refer as well to the general principles on which custom is based as to instances of its actual exercise, when a new case arises it is surely as reasonable to enquire from the heads of the tribe the principles on which it ought to be treated, as it would be to refer its decision to Hindu law or some other set of principles admittedly unknown to the tribe.”

Again, in *Sita Ram v. Raja Ram* ⁽²⁾, the question of the right—under customary law of collateral heirs, in his natural family, of a man who has been adopted to succeed in default of his lineal heirs to the property which he inherited by virtue of his adoption,—was decided on general principles in the face of contrary decisions, and it was pointed out that the heads of the Jat community would if questioned as to their custom, “ trace the history of the property in dispute, showing how it had been acquired and how it had descended to its last holder : they would show that it had never been the absolute property of any individual, but formed part of a large estate, which, though sub-divided, either temporarily or permanently for the purposes of enjoyment of profits, was ultimately the property of a community, whose only known law was custom, which custom was based, not in caprice, but on perfectly intelligible principles, having for their object the maintenance of the integrity of the community. They would thus explain that when any question arose for the solution of which there were no actual precedents, they were still able to deduce logically from the broad general principles which governed the community, the manner in which the new question should be solved, and they would maintain that the right of the collaterals of the donor,

(1) 107 P. R., 1887, F. B. (2) 12 P. R., 1892, F. B.

“or adopter, to succeed, was a logical deduction from these principles.”

The general principles applicable for the decision of the question are that ancestral land is considered as the property of the community and not of the individual. It is put by Sir M. Plowden in *Gujar v. Sham Das* ⁽¹⁾, as follows:—

“The prevailing sentiment in this province among agriculturists ascertained by the experience of the Courts and of the settlement officers and in compendious records of custom is that in respect of ancestral immovable property in the hands of any individual there exists some sort of residuary interest in all the descendants of the first owner or body of owners, however remote and contingent may be the probability of some among such descendants ever having the enjoyment of the property.”

It is put by Sir C. Roe in *Sita Ram v. Raja Ram* ⁽²⁾: “The whole principle underlying the enjoyment of, and succession to, land in villages held by a body of proprietors belonging to one tribe, or descended from a common ancestor, is that the land does *not* belong absolutely to the individual holder: for the time being it belongs to the family or community.”

The main principle of the customary law on this point being to preserve the land for the family or community, I am unable to see any ground for making a distinction between born and unborn sons, nor can I imagine that the heads of tribes would ever have entertained such a distinction, or held that a young man might dissipate his estate, and if he subsequently married, and had sons, that they would be in a different position from infant sons existing at the time of the alienation.

As regards difficulties arising out of the law of limitation—no doubt a holder's position might be attacked by a son born a very long time after the alienation, but that is a risk which the holder must take when he acquires from a man who may beget sons—a similar risk is taken by a party advancing money on an entailed estate where there is no existing heir, but one may be born afterwards. In any case a possible difficulty of limitation does not effect the question of custom.

As regards the argument that there must be some one in existence at the date of the alienation to attack it. It is conceded by my brother Reid that after-born sons can attack the alienation, if there are collaterals who have not ratified it,

⁽¹⁾ 107 P. R., 1887, F. B. ⁽²⁾ 12 P. R., 1892, F. B.

and it is only in the case where there are no collaterals at the date of the alienation that after-born sons cannot attack the alienation. The legal conception that a person may attack an act done before he was born does not present any difficulty to my mind. This happens where the holder has dealt with an entailed estate to the prejudice of his heir, and I have no difficulty in holding, that custom can, just as well as a deed, confer an interest in property on an unborn person, which can be asserted by that person after birth.

I would answer the question referred by saying that a son begotten after an alienation of ancestral immovable property by his father can, under customary law, impugn that alienation where it can be impugned by a son born before alienation.

27th April 1903.

CHATTERJI, J.—My learned brothers have differed in opinion as to how, in the absence of instances, or direct proof of a custom on the subject, the case of an after-born son of a male proprietor making an alienation of ancestral land is to be decided. Mr. Justice Reid holds that Hindu law, *i.e.*, the personal law of the parties, will be applied as Section 5 (b) contemplates that it will furnish the rule of decision where there is no custom proved and to the extent such law is unmodified by custom. The learned Chief Judge is of opinion, on the other hand, that, in the absence of a specific custom on the point before us, we ought not to fall back on the personal law, but to decide it on the general principles and analogies of customary law, inasmuch as Hindu law “has never been followed by, and is unknown to the tribes following customary law.”

The crucial point of difference is in the case of the alienation taking place when there is no person in existence capable of objecting to it, or, if there is such a person, he has consented to it before the birth of the son.

I am at one with the learned Chief Judge in holding that the mere want of instances is not enough to show that the rules of customary law do not apply to a particular case, and that the analogies and general principles of such law are to be resorted to when instances are absent, and applied whenever it is possible to do. A rule of custom may be established and held to be of binding force, even where no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence in its favour or if it is fairly deducible from the analogy of other well-known principles of customary law. I do not understand my brother

Reid to dispute this proposition, though he has not expressly adverted to it. His opinion postulates, I think, that no rule of customary law, actually proved by evidence or deducible from general principles, applicable to the question referred to us can be said to exist.

I think this reference is limited to a decision on the true deductions from the analogies and general principles of customary law. It is always open to the parties to a controversy like the present to prove, by actual instances or in other ways allowed by law, that there are specific provisions made by customary law for the rights of the unborn son in cases of alienation by his father before his birth.

To clear the ground for discussion of the general principles bearing on the subject before us, let us consider what the true position of a male owner governed by custom is with reference to ancestral land. It has been held in numerous decisions that he is a full owner (see, for example, *Devi Ditta v. Sandagar Singh* ⁽¹⁾), not a limited owner like the Hindu widow, but that his power of alienation is controlled by the right of his lineal descendants or agnates to succeed to his land after his death, which cannot be defeated, except in case of necessity, and then only to the extent such necessity is established. In this respect his position presents considerable resemblance to that of the Hindu widow. But it has been held that principles regulating necessity in his case are different to those applicable to the widow. This, however, is not matter germane to the present discussion. What is important to bear in mind is, that the limitation on his power of alienation is dependent on the rights of his male descendants, or, in their absence, of his agnates. The limitation of the widow's power is inherent in her tenure of her husband's estate. It has been laid down by their Lordships of the Privy Council in the case of the Hindu widow that, in the absence of qualified reversioners, the right of objection to improper alienations by her vests in the Crown. *The Collector of Masulipatam v. Cavalry Vencata Narainapah* ⁽²⁾. This is equally clear in customary law. The widow's estate is a mere growth from her right of maintenance, and, except in the case of valid necessity, her incompetency to alienate attaches to her estate irrespective of the rights of reversioners related to her husband.

But the male owner has no such disability. The restrictions on his power of transfer depend upon the existence of male

(1) 65 P. R., 1900.

(2) 8 Moo. I. A., 500.

descendants or agnates, and, if they do not exist, I do not think there is any limitation at all on his power of alienation. This is self-evident from the very statements of the rule restricting his power in the leading authorities on the subject and hardly requires any argument. Sir Meredyth Flowden, in *Gujar v. Sham Das* ⁽¹⁾, in a passage extracted by the learned Chief Judge in his judgment, which I think it unnecessary to repeat in mine, points out that the prevailing sentiment among agriculturists in this province, as ascertained by the experience of Courts and settlement officers and shown in the records of custom, is that in respect of ancestral land the descendants of the first owner or body of owners have a sort of residuary interest in such property which, in effect, gives them the right to object to alienations by the male holder, which, without good cause, defeats their right of succession. Sir Charles Roe, in *Sita Ram v. Raja Ram* ⁽²⁾, lays down the same thing in somewhat different language. See also Sir Meredyth Flowden's remarks about the tenure of the childless male proprietor in *Ilahia v. Gandi Singh* ⁽³⁾, at page 369. In *Lehna v. Mussammatt Thakri* ⁽⁴⁾, I pointed out in express terms the nature of the limitation of the male proprietors' power of alienation—pages 136, 137—and to this exception has never been taken as far as I am aware.

In fact the doctrine that the male proprietor is the full owner but that his transfers, except when justified by necessity, are capable of being impugned by his reversioners, which has been so often laid down, is intelligible only on the above principle. I accordingly hold it to be a basic doctrine of customary law that the male owner is unrestricted in his power of transfer, if at the time he makes it there is no one in existence competent to challenge it.

If we apply the principle to the solution of the question before us the result is somewhat as follows:—If the proprietor has sons or male lineal descendants, they can object to the alienation made by him, and the title of the alienee is a disputable one as the alienor's right of transfer was not unrestricted. An after-born son can dispute such an alienation for by birth he acquires the right to sue which he derives from the common ancestor *Roda v. Harnam* ⁽⁵⁾. The same remark holds good if the owner has no sons but agnates capable of objecting, for here also the transfer

⁽¹⁾ 107 P. R., 1887, F. B.

⁽³⁾ 116 P. R., 1890, F. B.

⁽²⁾ 12 P. R., 1892, F. B.

⁽⁴⁾ 32 P. R., 1895, F. B.

⁽⁵⁾ 18 P. R. 1895, F. B.

is voidable and the after-born son acquires the right to sue on birth and takes the place of the agnates. If the agnates consent or refuse to sue, but have male descendants, the title is equally disputable, for we allow more distant reversioners to sue when a nearer one refuses or neglects to do so.

In such a case also the after-born son is placed in the same position.

But where there is no lineal male descendant nor agnate existing at the time of the alienation, the power of the owner to alienate is without restriction. This is the typical case of unrestricted power. A closely analogous case is where the alienor has agnates but they ratify his act and are themselves childless.

In these cases the transfer is with full authority, and the transferee does not, at the time of the transaction, get disputed title. He acquires all the interest of his transferer which is plenary in all respects, and there is no residuary interest in the land vested in any one else—can the after-born son of the transferer challenge the alienation in such an instance? This is the special case in which my learned colleagues differ, being agreed in all others.

My answer, on the principles above stated, is that he cannot. A title unexceptionable at the time of the transfer cannot be vitiated by anything that subsequently transpires with which the transferee has no concern. This, I conceive, is the logical result of the premises I have set forth, and if the premises are right, as I have tried to show, the conclusion is right also.

I do not think there is any known doctrine of customary law which justifies an exception being made to the inevitable result of the male owner's position with reference to the property in the absence of lineal male descendants or agnates or, as we are accustomed to term them, male reversioners. The learned Chief Judge refers to cases of entailed estates, but I venture to think that they are not exactly in point, as the title depends upon the terms of the grant or settlement creating the estate tail. The estate of the tenant in tail is a limited one, whereas in the particular case under customary law we are considering there is no restriction on the male owner's right of property. The law of entail stands on a different footing from customary law, and I do not therefore pursue the discussion further.

But, is there any sufficient ground for thinking that, under customary law, there would be an exception to what would be a general rule, and that a perfect title would be vitiated by a

subsequent event over which the alienee has no control ? Would even the Punjab tribesmen hold that where a young man of twenty-five, absolutely without heirs, has made an alienation and marries and has male issue at the age of fifty, such issue may contest the sale within twelve years after his death, or, supposing the Punjab Limitation Act to apply, that his son might sue for a declaration if he is born within twelve years of the date of handing over possession under the transfer ? I should think their natural sense of equity would revolt against such a proposition.

Moreover, even if they were to say that the unborn son would have the right, should their bare statement be accepted ? I think this is such a novel question that no mere opinions should suffice, but actual instances should be required. For, though opinions can be proof of custom, the Court has always to decide whether and how far such proof should be held sufficient under the peculiar circumstances. It should also not be lost sight of that there are other considerations which bear on the question and that the Court's sole duty is not to strain every nerve to maintain the rights of the unborn son. Customary law, like other laws, is a branch of sociology and in the interpretation of its principles or in giving effect to them the Court must have regard to other relations which exist in the society in which the parties live. The number and complexity of these relations are constantly growing under a settled and civilized Government, and their mutual action must materially affect the Court's decision. Now, in such a state of society, transfers become common and there is no rule of equity which is so generally accepted as that alienees for valuable consideration who act in good faith should be protected. Among agriculturists, also, the justice of the rule is generally admitted, and I think we must bear it in mind before we give effect to so exceptional and so novel a doctrine as that a transfer by an owner of unrestricted power may be vitiated to the prejudice of the alienee by the subsequent birth of a son to the alienor. In the absence of clear instances, therefore, I do not think we should be justified in giving effect to a principle so inconvenient and so opposed to justice and equity.

I accordingly hold that a transfer by an owner who has no heir existing at the time, competent to challenge it, cannot be contested by a son born or begotten by the owner after the transaction. My brother Reid has come to the same conclusion on a somewhat different line of reasoning which has great force. I have confined myself to the bearing of the general principles

and analogies of customary law on the question before us which, as the learned Chief Judge says, must be exhausted before we can resort to Hindu law for its solution. But, in my opinion, those principles and analogies are adverse to the claim of the unborn son in the circumstances mentioned above.

In customary law inheritance does not vest in the son by birth in respect of ancestral property as in Hindu law governed by the *Mitacs'hara*, so that the son cannot claim to set aside his father's alienation or partition in the father's lifetime. Inheritance opens out on the death of the father and not before. But a right to sue for the declaration of invalidity of an improper alienation vests in the son and ordinarily in all agnates descended from the common ancestors which remains potential as long as such an alienation is not made, and comes into actual existence as soon as one is made. This is founded on the residuary right spoken of by Sir Meredyth Plowden in *Gujar v. Sham Dass* ⁽¹⁾, or is that right itself in a tangible form. It saves the inheritance if action is taken on it at the proper time. But where there is no one vested with the residuary right when the transfer takes place the whole interest passes to the alienee as it does in the case of alienations by full owners not governed by customary law, and there is no right of inheritance left which can accrue to the after-born son when the owner dies. This is how I would meet the argument put forward for the after-born son in *Civil Appeal No. 799 of 1899* and summarized in the referring order in that case. A transfer out and out such as a sale or gift best illustrates what I have said, but the reasoning applies *pro tanto* to temporary or partial transfers as well.

My reply to the question referred agrees in substance therefore with that given by Mr. Justice Reid.

⁽¹⁾ 107 P. R., 1887, F. B.

Full Bench.

No. 56.

Before Sir William Clark, Kt., Chief Judge, Mr. Justice
Chatterji and Mr. Justice Anderson.

APPELLATE SIDE. {

DERHU AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

SIDHU AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 360 of 1902.*

Limitation—Alienation of ancestral immovable property by soulless proprietor—Suit for possession by collaterals—Period of limitation applicable—Starting point of limitation—Limitation Act 1877, Schedule II, Articles 91, 120, 140, 142, 144.

Held, by the Full Bench,—

(1). It is not necessary for the reversioner of a holder of ancestral agricultural land to sue during his lifetime for a declaration of the invalidity of an alienation made by him as respects such reversioner's interest, and, in the event of his failing to do so, such reversioner is not precluded from suing for possession on the death of the alienor after the lapse of the period prescribed for such declaratory suits.

(2). The proper limitation for a declaratory suit of this nature is six years under Article 120 of the Limitation Act.

(3) In the case of a gift of ancestral agricultural land by a soulless proprietor to which the Punjab Limitation Act does not apply a suit by the heirs for possession is maintainable at any time within twelve years after the death of the donor.

Roda v. Harnam ⁽¹⁾, *Mangal v. Buta* ⁽²⁾, *Moti Lal v. Karrobuldin* ⁽³⁾, *Ilahiya v. Ganda Singh* ⁽⁴⁾, *Ranga v. Makhi Khan* ⁽⁵⁾, *Bhai Asz Ram v. Attar Singh* ⁽⁶⁾, *Hira Singh v. Dhana Singh* ⁽⁷⁾, *Mahomed Reasat Ali v. Hasin Baru* ⁽⁸⁾, *Francis Legge v. Rambaran Singh* ⁽⁹⁾, *Ram Chand v. Muhammad Khan* ⁽¹⁰⁾, *Puraken v. Parvathi* ⁽¹¹⁾, *Parvat Singhji v. Amar Singhji* ⁽¹²⁾, *Tukabai v. Vinayak Krishna Kulkarni* ⁽¹³⁾, *Baja Bai v. Krishnarao* ⁽¹⁴⁾, *Balvant Rao v. Puran Mal* ⁽¹⁵⁾, *Eshan Chunder Roy v. Monmohini Dassi* ⁽¹⁶⁾, *Brij Mohan Singh v. The Collector of Allahabad* ⁽¹⁷⁾, *Baggu v. Dulu* ⁽¹⁸⁾, and *Raghubar Dyal Sahu v. Bhikya Lal Missar* ⁽¹⁹⁾ cited and followed. *Nanak v. Devi Ditta* ⁽²⁰⁾,

* Case No. 1456 of 1899 was also disposed of by the judgment in this case.—ED.

⁽¹⁾ 18 P. R., 1895, F. B.

⁽²⁾ 19 P. R., 1883.

⁽³⁾ I. L. R., XXV Calc., 179, P. C.

⁽⁴⁾ 116 P. R., 1890, F. B.

⁽⁵⁾ 54 P. R., 1891.

⁽⁶⁾ 56 P. R., 1894.

⁽⁷⁾ 112 P. R., 1876.

⁽⁸⁾ I. L. R., XXI Calc., 157, P. C.

⁽⁹⁾ I. L. R., XX All., 35.

⁽¹⁰⁾ 135 P. R., 1888.

⁽¹¹⁾ I. L. R., XVI Mad., 138.

⁽¹²⁾ P. J. Bom. (1888), 272.

⁽¹³⁾ I. L. R., XV Bom., 422.

⁽¹⁴⁾ P. J. Bom. (1876), 252.

⁽¹⁵⁾ I. L. R., VI All., 1.

⁽¹⁶⁾ I. L. R., IV Calc., 685.

⁽¹⁷⁾ I. L. R., IV All., 339.

⁽¹⁸⁾ 10 P. R., 1890.

⁽¹⁹⁾ I. L. R., XII Calc., 69.

⁽²⁰⁾ 23 P. R., 1902.

and *Bhawani Prasad Singh v. Bisheshar Prasad Missar* ⁽¹⁾, overruled and dissented from. *Malkarjun v. Narhari* ⁽²⁾, *Jagadamba Choodhrani v. Dakkhina Mohun Roy Chaudhri* ⁽³⁾, *Tozak Ali v. Ameer Hossein* ⁽⁴⁾, and *Sham Lal Mitra v. Amarendra Nath Ghose* ⁽⁵⁾ distinguished.

Gujar v. Sham Das ⁽⁶⁾, *Devi Ditta v. Saudagar* ⁽⁷⁾, *Sobha Pundey v. Sobodra Bibi* ⁽⁸⁾, *Boo Jinatboo v. Shanagor Valab Kanji* ⁽⁹⁾, *Beni Pershad Koeri v. Dudli Nath Roy* ⁽¹⁰⁾, *Rallia Ram v. Sundar* ⁽¹¹⁾, *Rangan v. Mahbub Chand* ⁽¹²⁾, *Gujar Singh v. Puran* ⁽¹³⁾, *Shrinivas v. Harmant* ⁽¹⁴⁾, *Parvathi Ammal v. Samnatha Gurukul* ⁽¹⁵⁾, *Mohesh Narain Munshi v. Taruck Nath* ⁽¹⁶⁾, *Lachman Lal Chowdhri v. Kanhya Lal Mowar* ⁽¹⁷⁾, *Funnyamma v. Manjya Hebbur* ⁽¹⁸⁾, *Hem Raj v. Sahiba* ⁽¹⁹⁾, *Ganesha Singh v. Nathu* ⁽²⁰⁾, *Jaggan Nath Prasad Gupta v. Ranjit Singh* ⁽²¹⁾, *Lali v. Murli Dhar* ⁽²²⁾, *Chunder Nath Bose v. Ram Nidhi Pal* ⁽²³⁾, *Amir v. Attarunnissa* ⁽²⁴⁾ *Janaki Kunwar v. Ajit Singh* ⁽²⁵⁾ and *Ghulam Rasul v. Ajab Gul* ⁽²⁶⁾, referred to.

Further appeal from the decree of *J. G. M. Rennie, Esquire, Divisional Judge, Hoshiarpur Division, dated 7th January 1902,*

Sukh Dial, for appellants.

Ishwar Das, for respondents.

The question of limitation in the two cases which gave rise to these two references is practically one and the same. The first* was a reference to a Full Bench made by Clark, C. J., to consider whether in the case of a gift of immovable property by a childless proprietor a suit by the heirs for possession is maintainable at any time within twelve years after the death of the donor where the gift has not been set aside by a suit brought within the shortest period of limitation prescribed for such suit, and the other† by Chatterji and Anderson, JJ., to determine (1) whether it is necessary for the reversioner of a male holder of ancestral agricultural land to sue during his lifetime for a declaration of the invalidity of an alienation made by such holder as respects his interests, and, whether in the event of his failing to do so, he is precluded from suing for possession on the same ground on the death of the alienor after the lapse of the

* Case No. 360 of 1902.

† Case No. 1456 of 1899.

(1) <i>I. L. R., III All.</i> , 846.	(14) <i>I. L. R., XXIV Bom.</i> , 260.
(2) <i>I. L. R., XXV Bom.</i> , 337, P. C.	(15) <i>I. L. R., XX Mad.</i> , 40.
(3) <i>I. L. R., XIII Calc.</i> , 308, P. C.	(16) <i>I. L. R., XX Calc.</i> , 487.
(4) <i>3 Calc.</i> , L. R., 105.	(17) <i>I. L. R., XXII Calc.</i> , 609.
(5) <i>I. L. R., XXIII Calc.</i> , 460.	(18) <i>I. L. R., XXI Bom.</i> , 159.
(6) <i>107 P. R.</i> , 1887, F. B.	(19) <i>116 P. R.</i> , 1901.
(7) <i>65 P. R.</i> , 1900, F. B.	(20) <i>20 P. R.</i> , 1902.
(8) <i>I. L. R., V All.</i> , 323.	(21) <i>I. L. R., XXV Calc.</i> , 363.
(9) <i>I. L. R., XI Bom.</i> , 78.	(22) <i>I. L. R., XXIV All.</i> , 195.
(10) <i>I. L. R., XXVII Calc.</i> , 156 P. C.	(23) <i>6 Cal.</i> , W. N., 863.
(11) <i>83 P. R.</i> , 1883.	(24) <i>75 P. R.</i> , 1896.
(12) <i>55 P. R.</i> , 1897.	(25) <i>I. L. R., XV Calc.</i> , 58.
(13) <i>71 P. R.</i> , 1901.	(26) <i>57 P. R.</i> , 1891.

period prescribed for such declaratory suits; (2) what is the proper limitation for a declaratory suit of this nature.

The order of reference by the learned Chief Judge was as follows:—

6th Nov. 1902.

CLARK, C. J.—The question raised in this case* has been referred to a Full Bench (No. 1456 of 1899). I refer this case to Full Bench for decision of the following question.

Whether in the case of a gift of immovable property by a childless proprietor a suit by the heirs for possession is maintainable at any time within twelve years after the death of the donor, where the gift has not been set aside by a suit brought within the shortest period of limitation prescribed for such suit.

The order of the Division Bench (Chatterji and Anderson, JJ.) referring the questions of law to a Full Bench was as follows:—

7th Aug. 1902.

CHATTERJI, J.—†Counsel for the appellant takes the objection that the claim is barred by time under Article 91 of the Limitation Act. This ground is not entered in the memorandum of appeal but is patent on the record if it is correct, and was on this account permitted to be taken at a previous hearing which was adjourned as respondents' counsel stated that he was taken by surprise.

Reliance is placed on *Nanak v. Devi Ditta* ⁽¹⁾ which was an analogous case, and in which it was held that Article 91 barred the claim of the reversioners of a childless male proprietor governed by Customary Law for a declaration that a gift made by him more than three years before the date of the suit would not affect their reversionary rights. It professes to follow the decision of their Lordships of the Privy Council in *Malkarjun v. Narhari* ⁽²⁾, applying the shorter period in possessory as well as in declaratory suits.

The principle laid down in this ruling has been affirmed in another judgment of a Division Bench of this Court in Civil Appeal No. 1572 of 1899. In two other cases a similar opinion has been expressed, though the cases themselves have been disposed of on other grounds. See Civil Appeals Nos. 493 of 1899 and 461 of 1899.

* Case No. 360 of 1902.—Ed.

† Case No. 1456 of 1899.—Ed.

(¹) 23 P. R., 1902.

(²) I. L. R., XXV Bom., 337, P. C.

In *Ilahiya v. Gunda Singh* ⁽¹⁾, it was ruled by a Full Bench of this Court that it was not necessary for the reversionary heirs of a childless male proprietor to sue in his lifetime for a declaration of the invalidity of an alienation made by him, and that the fact that the limitation for making such a claim had expired was no bar to their suing for possession of the alienated property on his death. By this decision *Baggu v. Dullu* ⁽²⁾, in which a contrary opinion was expressed, was overruled. In the body of the judgment an opinion is also expressed that the limitation for a declaratory suit of the above description is six years under Article 120 of the Limitation Act.

This ruling of the Full Bench is binding on us until it is set aside. Moreover, the principle of the decisions above enumerated if accepted would revolutionize all the current doctrines about the limitation applicable to alienations by male holders of ancestral agricultural land and practically set aside the Full Bench decision *Roda v. Harwan* ⁽³⁾, to counteract the effects of which the Punjab Limitation Act was passed. We think therefore the matter should again be put before and considered by a Full Bench.

We accordingly refer the following questions:—

(1) Whether it is necessary for the reversioner of a male holder of ancestral agricultural land to sue during his lifetime for a declaration of the invalidity of an alienation made by him as respects such reversioner's interests, and, whether in the event of his failing to do so, such reversioner is precluded from suing for possession on the same ground on the death of the alienor after the lapse of the period prescribed for such declaratory suits.

(2) What is the proper limitation for a declaratory suit of this nature.

As well as the case itself to a Full Bench.

The following opinions were recorded by the learned Judges who constituted the Full Bench:—

CLARK, C. J.—This appeal* has been argued along with No. 16th March 1903, 1456 of 1899, and Mr. Sukh Dial has argued with ability on behalf of plaintiffs-appellants in this case* in favour of the longest period of limitation, and Mr. Muhammad Shafi for the respondent in the latter case† has ably argued in favour of the shorter period of limitation.

* Case No. 360 of 1902.

† Case No. 1456 of 1899.

(¹) 116 P. R., 1890, F. B. (²) 10 P. R., 1890.

(³) 18 P. R., 1895, F. B.

The facts in the first case* are that, on 2nd January 1886, Ram Singh gifted certain land to defendants by registered deed—he gave them possession and mutation of names on 27th March 1887. Ram Singh died in March 1890, and plaintiffs, reversioners of Ram Singh, filed this suit for possession on 17th May 1900, and the question is whether this suit is barred by limitation.

Until recently this Court, following *Roda v. Harnam* ⁽¹⁾, has held Article 144 of the 2nd Schedule of the Limitation Act, 1877, applicable, and that time began to run against reversioners only from the death of the donor.

Since the publication of *Malkarjun v. Narhari* ⁽²⁾, Division Benches of this Court have held that that decision in substance overrules the previous decision of this Court, and that the reversioners not having sued to set aside the alienation under Article 91 their suit for possession is barred (*Nanak v. Ieri Ditta* ⁽³⁾, and No. 1372 of 1899 and No. 492 of 1899).

The question is dealt with at greatest length in No. 1372 of 1899. The Judges (Johnstone and Rattigan, JJ.) there say: "Their Lordships of the Privy Council have, however, recently expressed an opinion which is, we think, binding on the Courts of this country, and has already been followed by this Court in several cases, to the effect that a suit to set aside an adoption must be brought within the period prescribed in Article 118 despite the fact that possession of land or other relief is sought with the annulment of the adoption (*Malkarjun v. Narhari* ⁽²⁾). From this it is to be inferred that the adoption can be set aside even during the lifetime of the adoptive father, and if an adoption, *a fortiori* a gift or sale."

The inference drawn here seems to me to be faulty. An adoption, although in some respects similar and having the same effect as a gift, is yet different as regards its capacity for being set aside.

An adoption may be altogether set aside during the lifetime of the adoptive father, but a gift or sale by a sonless proprietor cannot be so set aside by a reversioner: all the reversioner can do is to have so much of it set aside as affects his interests.

* Case No. 360 of 1902.

⁽¹⁾ 18 P. R., 1895, F. B. ⁽²⁾ I. L. R., XXI Bom., 337, P. C.
⁽³⁾ 23, P. R., 1902.

It was held in *Mangal v. Buta* (1) that such a suit could not be brought, that all a reversioner could do was to sue for a declaratory decree that the alienation would not affect his interest, and that Article 120 and not 91 was applicable, and this has been the procedure followed by the Courts. In *Moti Lal v. Karrab-ul-din* (2), their Lordships of the Privy Council held that there was a wide difference between setting aside a sale and deciding that a plaintiff's right was not affected by it. The ground may be cleared at once then by saying that a reversioner cannot in the lifetime of the alienor bring a suit to set aside the alienation, and Article 91 cannot apply.

The next question is whether Article 120 applies. It has been argued by Mr. Sukh Dial that the case of the alienation by a sonless proprietor under Panjab Customary Law is a *casus omissus* from the Limitation Act, but I am not disposed to agree to this contention, and think that Article 120 is applicable to the declaratory suit as held in the ruling quoted above.

The next question is whether a reversioner is bound to sue for such declaratory decree or whether he may neglect the alienation and wait and sue for possession within the time allowed him for a suit for possession. This question was considered by a Full Bench of this Court in *Uthiya v. Ganda Singh* (3), and it was there decided that it was not necessary for the reversioner to bring a suit for a declaration, that the alienation would not affect his interests, and this decision was followed in *Ranga v. Mukhi Khan* (4), and *Bhai Asa Ram v. Attar Singh* (5). I see no reason for differing from these judgments.

What is now to be considered is whether there is in *Mal-karjun v. Nuhari* (6) any such definite pronouncement of the law as to warrant a complete reversal of the decisions of this Court for more than twelve years.

Their Lordships there held that that suit was not a suit to set aside a sale, but that "if the conclusion could be reached that the suit is one to set aside the sale the result would be equally fatal to the plaintiffs," because they were bound under Article 12 (a) of the Limitation Act, 1877, to bring the suit to set aside the sale within one year from when the sale was confirmed.

(1) 19 P. R., 1883.

(4) 54 P. R., 1891.

(2) I. L. R., XXV Calc., 179, P. C. (5) 56 P. R., 1894.

(3) 116 P. R., 1890, F. B.

(6) I. L. R., XXV Bom., 337, P. C.

Their Lordships went on to say " In the adoption case just cited (*Jagadamba Chaudhrani v. Dakkhina Mohun Roy Chaudhri* ⁽¹⁾), the Board remarked that there was no principle on which simple declarations of invalidity should be barred by the lapse of twelve years after the adoption, while the very same issue, if only mixed up with a suit for the possession of the same property, is left open for twelve years after the death of the widow. Their Lordships make the same remarks now. What is the justification for refusing to construe Article 12 (a) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold that both the letter and the spirit of the Limitation Act require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the Article."

These remarks were made with reference to a suit to set aside a sale in execution of a decree in a Civil Court.

Now such a sale is on an entirely different footing from a sale by a sonless proprietor, the former is *primâ facie* valid against all the world, the latter is *primâ facie* invalid against the reversioner, it *primâ facie* does not touch the rights of the reversioner. The reversioner cannot, as I have said above, sue to set aside the sale, nor is it necessary for him to sue for a decree declaring that it shall not effect his rights; there is therefore no analogy between the two cases.

The remarks about the necessity of suing for declarations of invalidity of adoption are a reiteration of remarks made in *Jagadamba Chaudhrani v. Dakkhina Mohun Roy Chaudhri* ⁽¹⁾, and must be referred back to that case. Their Lordships held that under Article 129 of Schedule II of the Limitation Act of 1871 that a suit for possession where there was an effective adoption in dispute, was a suit to set aside an adoption, and that the rule of limitation in that article applied, they say that " the suit being rightly described as one to set aside an adoption attracted the consequence that the time for suing ran from the date of adoption."

It seems to me a very long state to extend the meaning of the remark in the later judgment, as deciding that under the later Limitation Act of 1877 a suit for possession, where an effective adoption was in dispute, was the same as a suit for a

(1) *I. L. R., XIII Calc.*, 308, P. C.

declaration of the invalidity of an adoption under Article 128 of Schedule II of the Limitation Act of 1877. Considering that this very question has been a bone of contention in all the High Courts of India, the Calcutta High Court, the Allahabad High Court and this Court holding that the law was different under the later Act and the Bombay and Madras High Courts that it was not (vide *I. L. R.*, 24 All. 195), it is not likely that their Lordships intended to dispose of the matter in these few lines, and I am disposed to think that the remarks should not be held to lay down any new principle or do anything more than reaffirm what was laid down in the previous case. The question of limitation in cases where an effective adoption is called in question is not however now before us, and it is not necessary to come to any decision on the question, and I have not in this judgment referred to adoption cases.

Whatever may be the law in adoption cases it is dangerous to extend a judgment to classes of cases different from the case in which it was passed, and there is nothing in the remarks to warrant the conclusion that a reversioner is bound to challenge the acts of a sonless proprietor. The case *Jagadamba Choudhrani v. Dakshina Mohan Roy Choudhri* ⁽¹⁾ was considered in the Full Bench ruling (*Ilahiya v. Ganda Singh* ⁽²⁾), where the opposite is ruled, nor that Article 120 which is a general article to cover cases otherwise unprovided for is on the same footing as an article for a specific class of suits as regards the barring of a subsequent suit for possession.

Mr. Muhammad Shafi has argued that *Roda v. Harnam* ⁽³⁾ is wrong; but after considering his arguments I see no reason to hold that judgment wrong.

I would answer the references as follows:—

- (1). It is not necessary for the reversioner of a holder of ancestral agricultural land to sue during his lifetime for a declaration of the invalidity of an alienation made by such holder as respects his interest, and, in the event of his failing to do so, he is not precluded from suing for possession, on the death of the alienor, after the lapse of the period prescribed for such declaratory suits.
- (2). The proper limitation for a declaratory suit of this nature is that prescribed in Article 120 of the Limitation Act.

⁽¹⁾ *I. L. R.*, XIII Cal., 308, P. C. ⁽²⁾ 116 P. R., 1890, F. B.
⁽³⁾ 18 P. R., 1895, F. B.

- (3). In the case of a gift of ancestral agricultural land by a sonless proprietor, a suit by the heirs for possession is maintainable at any time within twelve years after the death of the donor when the gift has not been set aside by a suit brought within the shorter period of limitation prescribed for such suit.

19th April 1903.

CHATTERJI, J.—I substantially concur in the opinion of my learned brother and proceed to give my reasons.

There is no contest in this case as to the *locus standi* of the reversioners of the male proprietor to question the alienation made by him, nor as to their right to have it set aside if it is proved to be without necessity. These principles were laid down in *Gujar v. Sham Das* ⁽¹⁾. For the purposes of this reference, apart from the merits of each particular case in which the points referred arise, we have to argue on the above assumptions. It follows therefore that the position of the reversioner of the male proprietor is very analogous to that of the reversioner of a widow having an interest in her husband's property for life. It is true that the male proprietor is not like the widow, a holder for life with limited powers of alienation in special cases; he is a full proprietor with plenary power of enjoyment of his property and a far greater power of contracting debts, which, if just, justify alienation for their payment, but there is this restriction on his power of alienation in the interest of his male descendant or agnates who have a residuary interest in property derived from a common ancestor that he cannot dispose of his land so as to defeat their right of succession without necessity. The distinction between the widow and the male proprietor and the essentials of necessity in the case of the latter are pointed out in the Full Bench case of *Deri Ditta v. Saudagar* ⁽²⁾, and *Sardari Mal, &c., v. Khan Bahadur Khan* ⁽³⁾, and the authorities cited therein. But as in the case of the widow, the alienation of the male owner, however unjustifiable, holds good for his life and the reversioner's right to possession only accrues on the male owner's death, and his right to contest the alienation is derived from the common ancestor (*Roda v. Harnam* ⁽⁴⁾), just as the right of the widow's reversioner is derived from her husband. During the male owner's life therefore the position of his reversioner is in respect of alienations made by the former very similar to that of the widow's reversioner. Such a reversioner has thus been allowed to sue

⁽¹⁾ 107 P. R., 1887, F. B.

⁽²⁾ 11 P. R., 1899.

⁽³⁾ 65 P. R., 1900, F. B.

⁽⁴⁾ 18 P. R., 1895, F. B.

for a declaration that a particular alienation of the male owner is bad as against him in such owner's lifetime. This was specifically recognized so far back as 1876, see *Hira Singh v. Dhana Singh* ⁽¹⁾, though there are earlier cases which have proceeded on the same principle, and has been accepted ever since. For the declaratory suit by the widow's reversioner during her lifetime a limitation has been fixed by the Limitation Act, Article 125, but there is none for the reversioner of the male proprietor, and it must be that prescribed by Article 120 unless there is another better applicable. I take their Lordships of the Privy Council to lay down in *Muhammad Riasat Ali v. Mussammatt Hasin Banu* ⁽²⁾ at page 163, the principle that "this article should be applied unless it is clear that the suit is within some other article," though doubtless the remark had bearing also on the facts of the case before their Lordships. I should be inclined to hold therefore that it is for those who seek to apply Article 91 to such a suit to make good their contention, see also the remarks of the Full Bench in *Francis Legge v. Rumberan Singh* ⁽³⁾, at page 38.

The principal point in support of the applicability of Article 91 is the general character of the language employed in its latter part, as it is meant for suits "to cancel or set aside an instrument not otherwise provided for," the other articles relating to instruments, *e. g.*, Nos. 92 to 96, being applicable to special facts. But while full effect must be given to the words "not otherwise provided for" effect must equally be given to the expressions "to cancel or set aside" used in the earlier part of the article. The question thus is narrowed to this—are the latter expressions applicable to suits in which a bare declaration that a particular alienation will not affect reversionary rights is sought.

There is a good deal of authority in favour of the view that the article applies only to suits as between parties to the disputed instruments, see *Mangil v. Buta* ⁽⁴⁾, where the question is fully discussed. The same opinion is held in *Ram Ohand v. Muhammad Khan* ⁽⁵⁾ on exactly the same grounds. In both cases reference is made to the fact that the article contemplates a case in which consequential relief is prayed for and not a mere declaration, and this appears to me to be a most material distinction to be borne in mind in the

(1) 112 P. R., 1876.

(2) I. L. R., XXI Cal., 157, P. C.

(3) 135 P. R., 1883.

(4) I. L. R., XX All., 35.

(5) 19 P. R., 1883.

present discussion. In *Jagadamba's* case ⁽¹⁾ their Lordships pointed out the distinction between "setting aside" and a declaration of invalidity of an adoption in discussing the language of Article 129 of the Limitation Act of 1871. The difficulty was then got over by reference to the fact that according to the practice of Indian Lawyers then prevailing "the phrase " 'suit to set aside an adoption' was a short and familiar " way of describing a class of suits * * * * which bring " the validity of the alleged adoption under question and " applied quite indiscriminately to suits for possession of " land and to suits of a declaratory nature " (pp. 319 and 320). Articles 118 and 119 are differently worded, and the practice which is not shown to have extended to suits other than suits relating to adoption cannot be said any longer to prevail. As was pointed out by Mr. Sukh Dial in the course of his able argument, the Limitation Act of 1877 fully recognizes the distinction between declaratory suits and those involving consequential relief throughout the Act. For example, Articles 12, 13, 14, 15, 44, 91, 95 and 126 use the expression "set aside" in respect of suits, and similarly 158, 163, 164, 166, 171, 172 with respect to applications. There can be no doubt that in all these articles consequential relief and not a mere declaration is meant. This is strikingly illustrated by the language of Articles 125 and 126. The former treats of suits by reversioners in respect of alienations made by widows brought in their lifetime and speaks only of a declaration, while the latter deals with suits by sons governed by the law of the *Mitakshara* to contest alienations made by their fathers, and was the expression "set aside" as consequential relief can and must be claimed in such suits. Their Lordships of the Privy Council in *Moti Lal v. Karrabuldin* ⁽²⁾ point out the distinction. The case itself which was a suit by a first purchaser at an auction sale in execution of a decree against a second purchaser at another auction sale in execution of another decree is very instructive in this connection. The second purchaser's objection, that no suit to set aside the sale was brought within limitation and that the claim must therefore fail, which was upheld in the first Court, was found by their Lordships to be untenable as nothing had passed under the second sale and there was no necessity to sue to set it aside. At page 186 their Lordships say—"Between setting aside a sale and holding " that plaintiff's rights are not affected by it, there is a wide

⁽¹⁾ *I. L. R., XIII Calc.*, 308, P. C. ⁽²⁾ *I. L. R., XXV Calc.*, 179, P. C.

"distinction." In *Tarab Ali v. Ameer Hossein* (1) in which the corresponding article of the Limitation Act of 1871 came under consideration it was held that the article was applicable "to a case where a man has himself under false representation or for some other reason granted a lease which he desires afterwards to set aside," i.e., to a suit between parties to the instrument and for consequential relief. In *Sobha Pandey v. Sobodra Biti* (2) the same view was taken of the scope of Article 91 as is laid down in the two Punjab cases quoted by me. *Puraken v. Parvathi* (3) was a suit by the reversioners of a Malabar *stanom* to declare that a *kanom* executed by the present holder was not binding on them, and it was held that Article 91 had no application.

It remains to notice a few of the authorities which appear to rule that Article 91 has a wider scope and applies to suits by persons not parties to the instrument. In *Boo Jinatboo v. Sha Nagar Valab Kanji* (4) the contest was between parties to the instruments sought to be set aside, and there is merely a *dictum* that Article 91 (Article 92, Act IX of 1871) applies to cases in which a bare declaration is sought regarding the cancellation of a bond or other instrument and not to cases in which possession of property after setting aside the deed is claimed. This does not really controvert the position taken up in the cases I have cited, and the remark evidently has reference to the facts of the case. A decree cancelling a deed does contain a declaration but it contains something more, which however has reference to the instrument and not to the property covered by it. *Bhawani Prasad Singh v. Bisheshar Prasad Missar* (5) is no doubt in support of the view that bare declarations by third parties are covered by the article. This is perhaps the only case which is in favour of the contention of the alienees. In *Beni Parshad Koeri v. Dulle Nath Roy* (6) their Lordships of the Privy Council after noticing the argument as to the application of Article 91 say : "It is a sufficient answer to this argument to say that though such an action might have been brought, the Maharaja was not bound to bring it, and there was no necessity for him to do so." The claim, if brought, would have been between persons other than parties to the instrument. It is probable that as their Lordships were disallowing the objection *in limine*, they did not mean to affirmatively lay down that the

(1) 3, Calc., L. R., 105.

(4) I. L. R., XI Bom., 78.

(2) I. L. R., V All., 323.

(5) I. L. R., III All., 846.

(3) I. L. R., XVI Mad., 138.

(6) I. L. R., XXVII Cal., 156, P. C.

suit would have been governed by Article 91. *Sham Lal Mitra v. Amarendra Nath Ghose* ⁽¹⁾ contains some expression of opinion from which it is possible to draw an inference favourable to the extended scope sought to be given to Article 91 by the alienees in the cases before us, but nothing definite was decided which militates against the view I am disposed to take on the authority of the cases first cited.

It is impossible to notice all the cases that bear on the question in this judgment, but I have mentioned some of the leading ones in support of both the views put before us.

The strongest point in favour of the contention of the alienees is that if Article 91 is excluded there is no other of general application to suits against the validity of instruments by persons not parties to them but whose interests are directly or potentially affected by them. To this the reply ought to be that such suits are comparatively rare, and can, at best, be for bare declarations only. The legislature has not provided a general article for declaratory suits, and they are therefore governed by Article 120. There is no violent improbability in suits of the description we are considering being also left without a special provision in a similar way and no impropriety in holding them to fall under the general article in question.

The language of the article appears to me to be a much more formidable objection to get over than the argument just noticed. As already stated a clear distinction is made in the articles of the Limitation Act between "setting aside" and asking for a declaration. The different wording must be attributed to a purpose, and this is made clearer by the arrangement of the articles. The word set aside must have the same meaning throughout the Act. We have already seen it laid down by the highest authority that the distinction exists, and is a substantial one. And yet, unless it is obliterated, the contention of the alienees about the application of the article to suits of the reversioners of male owners governed by the Punjab Customary Law cannot be accepted. Nay, more suits by parties to instruments under the Specific Relief Act must also be covered by the article, for there is no other. Articles 92, 93 relate to specific matters. Article 94 relates to property and likewise deals with a specific ground. Thus in the same article the words will bear different meanings.

(1) *I. L. R., XXIII Calc., 460.*

None of these considerations appear to have been noticed in the judgments of this Court which have led to this reference. In *Nanak v. Devi Ditta* ⁽¹⁾ the application of Article 91 to these suits is taken for granted. In Civil Appeal No. 1372 of 1899 the judgment merely refers to the summary given in Starting's Limitation Act, 4th Edition, page 225, without discussing the cases on which the summary is based as I have attempted to do. The same remark applies to Civil Appeal No. 493 of 1899.

Mr. Shafi for the alienee in one of the cases ingeniously argued that the word "cancel" had reference to Section 39 of the Specific Relief Act, while the expression "set aside" was meant to cover cases of declaration sued for by third parties. In *Rallia Ram v. Sundar* ⁽²⁾ it was said that "set aside" had reference to Section 35 of the Specific Relief Act, but, seeing that Article 114 was specially framed for cases of rescission of contract, I should hesitate to accept this view. The result, however, is not to support Mr. Shafi's contention which has to get over the cogent objections I have already noticed. We have merely to hold that "set aside" is used in a sense synonymous with "cancel," and thus, at best, there is but a slight redundancy in the language of the article, a defect which the best drafting can hardly always hope to avoid. I do not think the difficulties of adopting the construction contended for by Mr. Shafi have been sufficiently taken note of or considered in the cases which contain expressions of opinion in his favour. This being so, I hold, following the authorities first cited by me, that Article 91 does not apply to suits of the description we are considering.

The next point for consideration is what is the limitation for suits of this nature, if Article 91 is not applicable to them. As to this I have no difficulty in holding that six years is the time under Article 120 of the Limitation Act. The suits are admittedly for mere declarations and for nothing else - and such suits have been held to fall under the Article in numerous cases. *Parvat Singhji v. Amar Singhji* ⁽³⁾, *Puraken v. Parvathi* ⁽⁴⁾ already cited, a case very similar to the present one, *Francis Legge v. Rambaran Singh* ⁽⁵⁾, *Tukabai v. Vinayak Krishna Kulkarni* ⁽⁶⁾, *Bajra Bai v. Krishnrao* ⁽⁷⁾, *Balwant Rao v. Puran Mal* ⁽⁸⁾, *Eshan Chunder Roy v. Monmohini Dassi* ⁽⁹⁾,

⁽¹⁾ 23 P. R., 1902.

⁽²⁾ 83 P. R., 1883.

⁽³⁾ Bom. P. J. (1888), 272.

⁽⁴⁾ I. L. R., XVI Mad., 138.

⁽⁵⁾ I. L. R., XX All., 35, F. B.

⁽⁶⁾ I. L. R., XV Bom., 422.

⁽⁷⁾ Bom. P. J. (1876), 252.

⁽⁸⁾ I. L. R., VI All., 1.

⁽⁹⁾ I. L. R., IV Cal., 685.

Brij Mohan Singh v. The Collector of Ailahabad ⁽¹⁾. In our Court it has been expressly ruled, in at least two cases, that suits of the present description are governed by the six years' limitation under Article 120—*Mangal v. Buta* ⁽²⁾ and *Ram Chand v. Muhammad Khan* ⁽³⁾. See also *Baggu v. Dulu* ⁽⁴⁾ and *Ilahiya v. Ganda Singh* ⁽⁵⁾. I follow these rulings without hesitation and this is my answer to the question before the Full Bench on this subject.

I now come to the question whether no suit having been brought to declare the deed or act of alienation void as against the plaintiffs, within the period fixed for such suit, the plaintiffs are precluded from suing for possession on the death of the alienor when their right of succession accrued.

On the part of the alienees reliance is placed on (1) the rulings of their Lordships of the Privy Council in regard to adoption cases falling under Article 129 of the old Limitation Act, the scope of which has been extended by some of the superior Courts in India to cases under Article 118 of the present Limitation Act, and under which it has been held that by not contesting the adoption within the time fixed the heir to the adopter is precluded from denying it or claiming succession on the latter's death, and (2) the extension given to this doctrine by their Lordships in *Malkarjun v. Narhari* ⁽⁶⁾ and certain other decisions of the High Courts laying down the same principle. I proceed to consider these decisions in the same order.

(1) My learned colleague is disposed to think that the Privy Council have not yet made any distinct pronouncement in regard to suits relating to adoption under the present Limitation Act, and that their judgment under the old Limitation Act is not applicable to adoption cases governed by the new Act. The counsel for the reversioners has urged the same contention before us and I am free to admit that there is considerable force in it. We took this view repeatedly in the earlier cases: one of the latest among them is *Rangan v. Mahbub Chand* ⁽⁷⁾. But since that period this Court has held in three reported cases, besides others not reported, that the failure to sue for setting aside an adoption under Article 118 of the present Limitation Act is fatal to the heirs after the lapse of six years. I was a party

⁽¹⁾ *I. L. R.*, IV All., 339.

⁽²⁾ 19 P. R., 1883.

⁽³⁾ 135 P. R., 1888.

⁽⁴⁾ 10 P. R., 1890.

⁽⁵⁾ 116 P. R., 1890.

⁽⁶⁾ *I. L. R.*, XXV Bom., 337, P. C.

⁽⁷⁾ 55 P. R., 1897.

to one of them (*Gujar Singh v. Puran* ⁽¹⁾). The Bombay Court in a Full Bench decision has held that the rule laid down in *Jagadambha's* case applies under the new Limitation Act, also *Shrinivas v. Harmant* ⁽²⁾, and the Madras Court has also done the same—*Parvathi Ammal v. Saminatha Gurukul* ⁽³⁾. The main ground of these decisions is that in *Mohesh Narain Munshi v. Turuck Nath Matra* ⁽⁴⁾ Lord Shand in delivering the judgment of the Privy Council said, "It seems to be more than doubtful whether if these (*viz.*, the language of Article 118 of the present Limitation Act) were the words of the statute applicable to the case the plaintiff would thereby take any advantage" which appears to be an expression of opinion of their Lordships that the same principle would have applied under both the Limitation Acts. This is confirmed by the language of their Lordships in *Jachman Lal Chaudhri v. Kanhaya Lal Mowar* ⁽⁵⁾, at page 611, though it is not so explicit as in the former case. The expression of opinion in *Mohesh Narain's* case was before us when *Ranga v. Mahbub Chand* ⁽⁶⁾ was decided, but it was considered *obiter* as was done in *Pannyamma v. Manjaya* ⁽⁷⁾, with which we agreed. On further consideration I am disposed to think that their Lordships' opinion was clearly given on Article 118 of the present Limitation Act, and though not binding on us, as the point was not before their Lordships and was not actually decided, ought to be followed. Further in *Malkarjun's* case their Lordships approved of the application of the principle laid down in *Jagadambha's* case though the former was a case under Article 14 of the Limitation Act of 1877. For these reasons I and my learned brother who sat with me applied the rule in *Gujar Singh v. Puran* ⁽¹⁾, and in *Hem Raj v. Sahiba* ⁽⁸⁾, and *Ganesha Singh v. Nathu* ⁽⁹⁾, the same principle was adopted. The question is certainly not free from difficulty, and the Calcutta and Allahabad Courts still hold that *Mohesh Narain's* case is no authority in construing Article 118, see *Jagannath Prasad Gupta v. Runjit Singh* ⁽¹⁰⁾, and *Lali v. Murli Dhar* ⁽¹¹⁾. There is thus weighty reason in support of my learned brother's view, but speaking for myself I am now of opinion that the remark in *Mohesh Narain's* case though not absolutely binding on us, is a fair indication of what their Lordships would hold if a similar question

(1) 71 P. R., 1901.

(2) I. L. R., XXIV Bom., 260.

(3) I. L. R., XX Mad., 40.

(4) I. L. R., XX Cal., 487, P. C.

(5) I. L. R., XXII Cal., 609, P. C.

(6) 55 P. R., 1897.

(7) I. L. R., XXI Bom., 159.

(8) 116 P. R., 1901.

(9) 20 P. R., 1902.

(10) I. L. R., XXV Cal., 363.

(11) I. L. R., XXIV All., 195.

to that decided in *Jagadambha's* case arose before them under Articles 118 and 119 of the present Limitation Act, and that the whole drift of the judgment in *Iachman Lal Chowdhri v. Kanhaya Lal Mowar* ⁽¹⁾ goes to support this conclusion. I am also anxious, as far as may be, to maintain consistency in this Court's judgments, and there being already three judgments published in the *Punjab Record* by different Benches and Judges in which the view propounded in *Gujar Singh v. Puran* ⁽²⁾ has been accepted, I adhere to the opinion expressed in that decision.

(2). Before considering the bearing of these cases on the question before us I shall briefly notice some of the most important among them. The leading case is that of *Mulkarjun v. Nakhari* ⁽³⁾, decided by the Privy Council in which their Lordships held that a person whose property was under mortgage to another, and was afterwards sold in execution of decree at the instance of another creditor and purchased by the mortgagee, was not competent after the expiry of the year fixed by Article 12 of the Limitation Act for setting aside auction sales, to claim redemption from such purchaser. Their Lordships applied the principle of *Jagadambha's* case to this one and said, "What is the justification for refusing to construe Article 12 (a) according to its obvious meaning whenever the suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold that both the letter and the spirit of the Limitation Act require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the Article" (page 352). At another place they observe: "But if the sale is a reality at all, it is a reality feasible only in the way pointed out by law, and it seems to their Lordships that the case must fall either within Section 311 of the Code or within Article 12 (a) of the Limitation Act of 1877, or within both, any way, there exists a bar by one year's delay."

It is not possible to go through all the cases which have been decided on the principles above stated, nor is it necessary to do so. One of the latest is reported as *Chunder Nath Bose v. Ram Nidhi Pal* ⁽⁴⁾, in which it was held that a suit to recover possession of land held by the defendant under a *kalala* executed by the father of the plaintiff was barred after the lapse of three years under Article 91, no suit having been brought to set it

⁽¹⁾ I. L. R., XXII Cal., 609.

⁽²⁾ 71 P. R., 1201.

⁽³⁾ I. L. R., XXV Bom., 337, P. C.

⁽⁴⁾ 6 Cal. W. N., 863.

aside within this period. There are many earlier cases laying down the same doctrine which are noticed and discussed in *Amir v. Atturunnissa* ⁽¹⁾ and *Rangan v. Mahbub Chand* ⁽²⁾ and other authorities, and I need not recapitulate them here.

In my opinion these cases do not furnish ground for the extension of the doctrine laid down by their Lordships of the Privy Council in *Jagadamba's* case or *Malkarjun's* case, to suits of the description we are considering.

In the first place, as pointed out before, suits to set aside a deed under Article 91 involve consequential relief and can only be brought as between parties to the transaction or their representatives. A mere declaration is not granted and cannot be under the proviso to Specific Relief Act, Section 42, though a declaration is necessarily involved in all decrees in such suits. This perhaps explains the remark of West, J., in *Boo Jinalboo v. Shahnagar Valab Konji* ⁽³⁾. *Janki Kunwar v. Ajit Singh* ⁽⁴⁾ was a suit by the executant of the deed and his representation by gift. The case of *Chandar Nath Bose v. Ram Nidhi Pal* ⁽⁵⁾ was a case of representatives of the original grantor and they were held bound by the limitation provided in Article 91. *Ghulam Rasul v. Ajab Gul* ⁽⁶⁾ is another case in point in which the guardian of the plaintiff had alienated his estate during his minority. The case can be multiplied to any extent. The principle of the decisions is as explained in *Rangan v. Mahbub Chand* ⁽²⁾ that the deed proceeds from the plaintiff himself or his predecessor in interest or his agent or guardian (who is juristically a sort of agent for certain limited purposes) and binds him unless it is set aside. The time prescribed for setting it aside having expired no suit for that purpose can be filed and the deed therefore holds good. Such a deed necessarily precludes any suit in respect of its subject matter contrary to its terms. Here there is an obvious reason why the shorter period of limitation must be availed of or the question cannot be raised in any other form, *i. e.*, a man cannot sue, for example, for possession of the land conveyed by the deed within twelve years after the limitation for suing to set it aside has expired. The true remedy of the plaintiff lies in the suit for which the shorter period of limitation has been fixed and, if he loses it, he loses altogether the property to which the deed relates. Moreover the cancelling or

⁽¹⁾ 75 P. R., 1896.

⁽²⁾ 55 P. R., 1897.

⁽³⁾ I. L. R., XI Bom., 78.

⁽⁴⁾ I. L. R., XV Calc., 58.

⁽⁵⁾ G. Calc., IV. N., 863.

⁽⁶⁾ 57 P. R., 1891.

setting aside of the deed puts an end to the deed as a document of title and all question as to the validity of the transaction entered in, or evidenced by it between the parties and their representatives in interest.

The same remark holds good with reference to other articles which relate to suits to 'set aside' particular transactions or acts. Take for example Article 12 (a). It applies to all suits to set aside auction sales in execution of decrees of Civil Courts and fixes the period to be one year. Now it relates to a suit aiming at the complete annulling of the sale. It is expedient for the safety of titles that such suits should be brought as speedily as possible. A short limit is therefore fixed. In such a suit the Court can on the one hand declare the sale to be valid and the plaintiff's claim unfounded and on the other hold it to be invalid and cancel it entirely. After losing such a suit the plaintiff cannot claim possession of the property sold within twelve years and raise the question of validity of the sale again. If he does not file such a suit he loses his remedy of setting it aside and obviously cannot seek it in another form by claiming possession of the property. Their Lordships of the Privy Council in *Mulkarjun's* case pertinently point out that, "If the protection (by Article "12 (a)) is to be confined to suits which seek no other relief "than a declaration that the sale ought to be set aside, and is "to vanish directly some other relief consequent on the annulment "of the sale is sought, the protection is exceedingly small." This remark puts in a nutshell the whole of the reasoning in favour of the plaintiff being precluded from seeking to set aside the sale after failing to sue for this purpose within one year, and it is hardly possible to improve on it. The same remarks apply generally to all articles in which the words "set aside" have been used.

Where, however, the transaction, act or deed is a nullity or presumably invalid, there is no necessity for a suit to set it aside and the above rule does not apply. In *Moti Lal v. Karabuddin* (1) cited above, their Lordships held that a suit by the purchaser of the disputed property at the first auction sale in execution of decree under Article 12 (a) was unnecessary, and that he was not precluded by that Article from suing within twelve years to recover his property, as the second sale passed no interest in the property and was not set aside by the decree but was found not to affect the plaintiff's rights. In *Beni Pershad Koiri's* case (2), where a

(1) I. L. R., XXV Calc., 179, P. C. (2) I. L. R., XXVII Calc., 156,

life grantee from a zamindar in Bengal had purported to grant a perpetual lease, their Lordships held that the zamindar was not bound to sue to set aside the lease and that there was no necessity for him to do so (page 165). I need not multiply cases to this effect but merely content myself with remarking that the statement of the law in the head-note to *Raghubar Dyal Sahu v. Bhukya Lal Misser* ⁽¹⁾, which runs to this effect "Where a certain period is allowed by the law of limitation, within which an instrument affecting a person's rights or immovable property must be impugned, and the person whose rights or property are affected fails to impugn such instrument within such period * * * * he will not be precluded from availing himself of the longer period allowed for the recovery of immovable property, provided that he can prove that such instrument is null and void so far as his interests are concerned"—and which was applied in *Ghulam Rasul v. Ajab Gul* ⁽²⁾, *Amir v. Mussammatt Attarunnissa* ⁽³⁾, and *Rangan v. Mahub Chand* ⁽⁴⁾, is still a generally correct statement.

In the next place suits for purely declaratory decrees that a particular deed, transaction or act will not affect the plaintiff's rights of reversion when they accrue do not fall within the purview of this reasoning. The law of limitation must be strictly construed, *i. e.*, its scope cannot be stretched to extend to cases not covered by its language, and, where the indications as to its application are not clear, the construction must be in favour of the right to proceed. Their Lordships have not held the principles of *Jagadamtha's* case to apply to purely declaratory suits, except possibly by implication suits falling under Articles 118, 119 of the Limitation Act, which have a distinctive character of their own as will be shown further on. They have not anywhere said that the shorter period provided by Article 91 applies to declaratory suits much less that it applies to such suits as we are considering. I think, therefore, the bar of limitation by the shorter period must be very clearly established against the plaintiffs in the class of suits last named. If there is a reasonable doubt of its application the suits must be allowed to proceed.

I have already shown that these suits are analogous to suits by reversioners of Hindu or Muhammadan widows who hold their husbands' property on a life estate. The power of the male owner to alienate is no doubt greater; he is full owner and the tests of necessity in his case are much less stringent, but with all

⁽¹⁾ *I. L. R.*, XII Cal., 69.

⁽²⁾ 57 *P. R.*, 1891.

⁽³⁾ 75 *P. R.*, 1896.

⁽⁴⁾ 55 *P. R.*, 1897.

these distinctions, the position of the next male heir strikingly resembles that of the widow's reversioner. In the case of the widow a special limitation has been provided for declaratory suits impugning alienations made by her in so far as they affect the reversioner's rights. But it has never been held that the widow's reversioners by not suing for a declaratory decree in her lifetime are precluded from suing for recovery of the property and from raising the question of the validity of the alienation after her death. Nor has it ever been held that such reversioner, by not suing within three years under Article 91 to set aside the deed of alienation, loses the right of challenging it afterwards. If analogies are to be made use of to deprive the present plaintiffs from suing for recovery of the property because they did not sue to declare the invalidity of the alienation, as respects their rights within three years, why should such an obvious analogy be lost sight of?

Declaratory suits of this kind stand on a wholly different footing from suits to set aside or cancel a deed. In the latter consequential relief is asked for, and when the right of suit is established and the allegations on which relief is claimed are made good, the plaintiff must get a decree cancelling or setting aside the deed in whole or in part. A declaratory decree, however, does not set aside the deed, which stands good as between the parties to it, but merely provides that the plaintiff's rights if they accrue will not be affected by it. As pointed out by their Lordships of the Privy Council there is a wide difference between the two reliefs.

Again, declaratory decrees are purely within the discretion of the Court. A plaintiff cannot always insist on getting it as of right. In many instances, *e.g.*, where the claimant is not the immediate reversioner, it is generally refused. How can a suit to "set aside" a deed be placed in the same category with a suit for a declaration for a right in future? Take a concrete example. Suppose the immediate reversioner of a male owner does not sue for the declaration, and the next reversioner, thinking it useless to sue in his presence, also does not sue, but the former dies before the succession opens out. Is the latter to be precluded from suing for possession because he did not bring a suit which was bound to fail? Or suppose he did bring such a suit and it was dismissed because he was not the next reversioner, what is to happen? Suppose again that the immediate reversioner did sue, but the Court thought, in its discretion, perhaps erroneously, that a declaratory decree should not be given. What limitation will

apply when such reversioner sues for the property? To dismiss the suit in these instances on the ground of limitation, contended for by respondent, would land us in an absurdity and be tantamount to saying that the right of the male owner to alienate is uncontrolled.

A further reason against holding the shorter period compulsory is that the true position of the alienee and the reversioner would thereby be reversed. The alienee, *ex hypothesi*, takes a disputed title; the alienation is bad unless it is for necessity, the burden of proof of which is on the alienee. To hold, under the circumstances, that the reversioner must sue for a declaration within the shorter period or be barred from suing altogether would be practically tantamount to throwing on him the duty of suing to prove it to be bad instead of leaving it to the alienee to prove its validity. Of course, if no action is taken by the reversioner for a long time to challenge the alienation, an equity may arise in the alienee's favour, and acquiescence and consent may under certain circumstances be inferred against him, but this is quite a different matter. Here we are considering simply a question of limitation.

There remains the question as to the effect of the ruling of the Privy Council in regard to adoption cases. The decision under Article 129 of Act IX of 1871, which was differently worded from Articles 118 and 119, would not apply to declaratory suits, but if we regard, as I do, their Lordships to hold that their decision would have been the same under the articles of the present Limitation Act relating to adoption the principle has an apparent bearing on the declaratory suits I am discussing, and I must advert to it. I think that there is a material distinction between suits governed by Articles 118 and 119 and the present class of suits. Adoption is a status which has a bundle of rights attached to it and is very different from a mere deed or act of alienation of property. The reversioner thereby is ousted from his present position as heir presumptive and is not merely threatened with a prospective loss of property as in the case of an alienation. A declaratory decree against an adoption has a *present* operation and puts an end to the status of the adopted as far as he, the adopter and the plaintiff-reversioner are concerned, while a similar decree as regards an alienation does not set aside the alienation but merely protects the reversioner's rights on the alienor's death. In other words the adoption is actually set aside while the decree in the other case operates *in future* and

may never operate at all. In the former case the declaration is practically tantamount to consequential relief. The adoption has an effect *in presenti* and if owing to lapse of limitation for suing to set it aside the remedy of the reversioner against it is lost, the adoption cannot be displaced and, as a consequence, the person adopted excludes the reversioner. The result, in fact, is exactly the same as in the case of a deed by a party himself, or his predecessor, not being set aside within the proper limitation and becoming thereby binding as respects the property dealt with by it. I hold, therefore, that this argument does not avail to help the case for the alienees before us.

It must not also be forgotten that there is no time fixed for a declaratory suit by the reversioners of a male proprietor, and it is merely a matter of legal inference that it is covered by Article 120. The argument that the shorter period of limitation must be held to apply does not seem to have the force it has in a case where such shorter period is actually provided. The inference as to the intention of the Legislature cannot be said to be so strong in such a case.

I am further of opinion that the alienation being presumably invalid, unless its validity is affirmatively established, the principle acted on by their Lordships of the Privy Council in *Moti Lal's* and *Beni Parshad's* cases before cited, appears to be applicable. The plaintiff could no doubt have brought a suit against the alienation before, but he was not bound to bring it. And this is true whether Article 91 or Article 120 is held to apply to such a suit.

The matter we are considering has already been provided for by the Punjab Limitation Act, I of 1900, and the effect of our decision will be confined to the comparatively small number of cases to which it does not apply.

As pointed out in the referring order in Civil Appeal 1436 of 1899, the point we are considering was expressly ruled by a Full Bench in *Ilahiya v. Ganda Singh* ⁽¹⁾, which appears not to have been noticed in any of the judgments in which the shorter period of limitation was applied to the suit of the reversioners. After carefully considering the cases, on the strength of which the judgment of the Full Bench is said to be wrong, I can come to no other conclusion than that it is right and should be followed. Perhaps had the attention of the learned Judges been directed to it the occasion for this reference would not have arisen.

(1) 116 P. R., 1890, F. B.

I would accordingly reply to the reference in the words of the learned Chief Judge.

ANDERSON, J.—I have but little to add to the exhaustive judgments of my learned colleagues. 28th April 1903.

Having been a party to the judgment in the case of *Nanak and others v. Devi Ditta and others* ⁽¹⁾, I may, perhaps, point out that the main ground for decision in that case was that the donees, whose title it was sought to impugn within twelve years of the death of the donor's widow, had been in undisturbed possession for twenty-four years. The ruling of the Privy Council in *Malkarjun v. Narhari* ⁽²⁾ was referred to as an additional reason for holding their claim time-barred, but the applicability of Article 91 was not minutely discussed.

On fully considering the question of the applicability of that article in the case of suits brought by reversioners to dispute the efficacy of alienations under Punjab Customary Law, I am now satisfied that the article does not apply. In all such cases the allegation of the reversioner practically is that the instrument of alienation, to which neither he himself nor his representative in title (taking him as deriving his title from an ancestor common to himself and to the alienor) has been a party, is invalid so far as he is concerned. Whether it be actually cancelled or not is immaterial to him, provided that he can obtain a decree to the effect that his right of succession is to remain unimpaired when it falls into him. This was clearly put by Rattigan, J., in *Mangal v. Buta* ⁽³⁾, where it was decided that the limitation for such declaratory suits must be six years under Article 120 of the 2nd Schedule of the Limitation Act. Article 91 appears to apply to a different class of cases where the plaintiff's present rights rather than his contingent rights are menaced, where cancellation is not actually necessary or is auxiliary to the granting of other relief the article does not apply.

The same principle holds good with reference to limitation in suits brought by reversioners for possession subsequent to the death of the alienor. The ground taken by the plaintiff in such suits is that there has, in fact, been no alienation outright but only a temporary one effective during the lifetime only of the alienor whose nominee it has not been in the plaintiff's power to dispossess, hence the contention that adverse possession can supervene only on the death of the alienor becomes opposite

⁽¹⁾ 23 P. R., 1902.

⁽²⁾ I. L. R., XXV Bom., 337.

⁽³⁾ 19 P. R., 1893.

and the twelve years' rule applies under Article 144. I would therefore still follow *Roda v. Harnam* ⁽¹⁾ as an authority for allowing the longer period, however desirable it may be in the interest of the alienee that a shorter period should be fixed.

The question of limitation in adoption cases has come up incidentally in the course of the elaborate arguments which have been addressed to the Full Bench. In several recent decisions by Division Benches, Article 118 has been held to apply in such cases. *Shrinivas Murar v. Hanmant Chardo* ⁽²⁾, being taken as an authority for the view that, in case of declaration or suit for possession, no more than six years limitation can be allowed. If adoption be regarded as a gift held over in accordance with the view expressed on page 22 of *Roe and Rattigan's Tribal Law*, para. 26, line 3, it might be difficult to hold that a different limitation should be allowed from that allowed in cases of gift, but there are certain circumstances in connection with the status of the adoptee which put him in a stronger position as regards the reversioners than an ordinary donee, and hence it becomes more expedient that any dispute arising should be quickly brought to an issue and disposed of. If Article 118 can be regarded as covering the case of customary adoptions as well as of adoptions in the sense of the Hindu Law, the difficulty is solved and the rule in *Jagadambha Chaudhrani v. Dakhina Mohun Roy Chaudhri* ⁽³⁾ can be applied. The remark by Lord Shand in his judgment in the case of *Mohesh Narain Munshi v. Taruck Nath Moitra* ⁽⁴⁾ does not appear to assist much in the elucidation of the question of limitation in cases of customary adoption. If it were necessary to express an opinion I should be disposed to fall in with the views expressed by my learned brother Chatterji.

In conclusion I have to express my concurrence in the answers given to the references made to the Full Bench in the same terms as my learned colleagues.

Final Order.

This appeal is therefore accepted and the order of the Divisional Judge set aside and the case remanded to him under Section 562, Civil Procedure Code, for decision of the appeal.

As the plaintiffs, except Rai Devi Singh, have before the hearing denied that they appealed and prayed to have their names struck off the record, their names are struck off the record.

⁽¹⁾ 18 P. R., 1895, F. B.

⁽³⁾ I. L. R., XIII Cal., 308.

⁽²⁾ I. L. R., XXIV Bom., 260.

⁽⁴⁾ I. L. R., XX Cal., 487.

Court-fee on this appeal will be refunded—other costs to be costs in the case; plaintiffs, other than Rai Devi Singh, are not liable for any costs in this case or subsequent proceedings.

No. 57.

*Before Sir William Clark, Kt., Chief Judge, and
Mr. Justice Chatterji.*

MUSSAMMAT SAHIB NUR,—(PLAINTIFF),—APPELLANT,

Versus

MUHAMMADJI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 65 of 1902.

Civil Procedure Code, 1882. Sections 372, 588 (21)—Application to be brought on to record in substitution for plaintiff—Dismissal of such application—Appeal.

Held, that there is no appeal from an order dismissing an application to be made a party under Section 372 of the Code of Civil Procedure. Section 588 (21) only allows an appeal from an order disallowing objections to an application under that section.

Indo Mati v. Gaya Prasad ⁽¹⁾, *Moti Ram v. Kundan Lal* ⁽²⁾, and *Commercial Bank of India v. Sabju Saheb* ⁽³⁾ distinguished.

Jamna Bibi v. Sheikh Jhan ⁽⁴⁾ and *Lalit Mohan Roy v. Shebock Chand Chowdhury* ⁽⁵⁾ cited.

*Miscellaneous first appeal from the order of Lala Makhun Lal,
Sub-Judge, Rawalpindi, dated 23rd October 1901.*

Ishwar Das, for appellant.

Lal Chand, for respondents.

The judgment of the Court was delivered by

CHATTERJI, J.—This is an appeal from an order disallowing an application of the appellant under Section 372, Civil Procedure Code, to be substituted in place of the original plaintiff. It so happened that the plaintiff was dead at the date the application was made, but this is immaterial and it has already been held by this Court that the application was one under Section 372. 5th Feby. 1903.

It is objected for the respondent that the appeal does not lie. We are of opinion after referring to the authorities that the contention is well founded and must prevail. Section 588 (12)

⁽¹⁾ *I. L. R., XIX All.*, 142.

⁽³⁾ *I. L. R., XXIV Mad.*, 252.

⁽²⁾ *I. L. R., XXII All.*, 380.

⁽⁴⁾ *I. L. R., XXIV All.*, 532.

⁽⁵⁾ 4, *Calc.*, W. N., 108.

only allows an appeal from an order disallowing objections to an application under Section 372, but here the objections were allowed and the section does not permit appeals from orders other than those specified. Appellant's counsel admits that he has no appeal under Section 588, but he argues, on the authority of *Indo Mati v. Gaya Prasad* ⁽¹⁾, *Moti Ram v. Kundun Lal* ⁽²⁾, *Commercial Bank of India v. Sahju Saheb* ⁽³⁾, that the order is an adjudication in the suit and is tantamount to a decree and is therefore appealable.

In *Indo Mati v. Gaya Prasad* ⁽¹⁾ it is expressly ruled that Section 588, Civil Procedure Code, prohibits an appeal from an order of the present description under Section 372, but on the facts of that case it is held that there was an adjudication as to the representative right of the appellant which could be challenged by an appeal under Section 244, the case being one in execution of decree. The facts of *Moti Ram v. Kundaun Lal* ⁽²⁾ are also different. There certain assignees of the plaintiff preferred an appeal on the strength of the assignment, and the refusal to entertain their claim led to the dismissal of the appeal which was treated as equivalent to a decree. The special features of these cases were pointed out in a very recent judgment of the Allahabad Court reported in *Jamna Bibi v. Sheikh Jhan* ⁽⁴⁾, and it was held that an appeal did not lie under Section 588 from an order refusing to grant an application under Section 372. The latter view appears to agree with that of the Calcutta Court—see *Lalit Mohan Roy v. Sheboch Chand Chowdhury* ⁽⁵⁾. These authorities seem to us to take a right view of the subject. The Madras ruling was under Section 15 of the letters patent of the Court. In the present case the order did not dispose of the suit, and thus there is no ground for arguing that it amounts to a decree.

We hold therefore that no appeal lies from the lower Court's order and dismiss this appeal with costs.

Appeal dismissed.

⁽¹⁾ *I. L. R., XIX All.*, 142.

⁽³⁾ *I. L. R., XXIV Mad.*, 252.

⁽²⁾ *I. L. R., XXII All.*, 380.

⁽⁴⁾ *I. L. R., XXIV All.*, 532.

⁽⁵⁾ 4 *Calc. W. N.*, 108.

No. 58.

Before Sir William Clark, Kt., Chief Judge, and
Mr. Justice Anderson.

JAGAN NATH,—(PLAINTIFF),

Versus

NIRANJAN DAS,—(DEFENDANT).

} REFERENCE SIDE.

Civil Reference No. 3 of 1902.

Provincial Small Cause Court Act, 1887, Schedule II, Article 18—Suit to recover money spent in connection with the guardianship of a minor—Suit relating to a trust.

Held, that a suit by the guardian of a minor to recover money spent by him in connection with the guardianship of the person and property of his ward over and above the amount of the income realized by him is a suit "relating to a trust" within the meaning of Article 18 of the Second Schedule, to the Provincial Small Cause Court Act, and is therefore not cognizable by the Small Cause Court.

Ramjoy Mozoomdar v. Koomar Kedar Narain Roy (¹) referred to.

Case referred by S. Clifford, Esquire, Divisional Judge, Delhi Division, on 3rd January 1903.

Sangam Lal, for plaintiff.

The judgment of the Court was delivered by

CLARK, C. J.—In this case plaintiff sues for the recovery of money spent in connection with the guardianship of the person and property of the minor defendant over and above the income realized from the minor's estate, plaintiff having been appointed his guardian and subsequently removed. 29th May 1903.

The question is, whether this is a suit relating to a trust under Article 18, Schedule II of the Small Cause Court Act.

The Divisional Judge held that it was not on a consideration of the definition of "trust" in Act II of 1882. The fiduciary relation between a guardian and ward is laid down in Act VIII of 1890, and the due administration of the estate is a trust and the guardian is in the position of a trustee to his ward.

This case is the converse of *Ramjoy Mozoomdar v. Koomar Kedar Narain Roy* (¹), where the minor sued his guardian for money due on account of his guardianship and the suit was held to be one relating to a trust. In our opinion the present suit is

(¹) 25 W. R., 75.

“one relating to a trust” and comes under Article 18, Schedule II of the Small Cause Court Act, and we decide the reference under Section 646, Civil Procedure Code, accordingly. Case returned to Divisional Judge.

No. 59.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

RAJA RAM AND ANOTHER,—(PLAINTIFFS),—
APPELLANTS.

Versus

TILOK CHAND AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 1539 of 1899.

Limitation Act, 1877, Section 4, Explanation—Suit by pauper—Application for leave to sue in formâ pauperis—Subsequent payment of Court fees after period of limitation—Date of institution of suit.

An application for leave to sue as a pauper to set aside an auction sale in execution of a decree was presented within the prescribed period allowed by Article 12 of the Second Schedule to the Limitation Act. The defendant disputed the alleged pauperism, and pending the enquiry on that question the plaintiff paid into Court the amount of stamp duty required for the suit. The defendant pleaded limitation, as at the time the Court fees was paid the suit was beyond time.

Held, that the suit was not barred. It should be deemed to have been instituted from the date the plaintiff filed his application for leave to sue as a pauper and not when he paid in the necessary Court fee.

Janakdhari Sukul v. Janki Koer ⁽¹⁾ and *Skinner v. Orde* ⁽²⁾ cited.

Further appeal from the decree of D. C. Johnstone, Esquire, Divisional Judge, Umballa Division, dated 31st August 1899.

Sohan Lal, for appellants.

Ishwar Das, for respondents.

The judgment of the Court, so far as is material for the purposes of this report, was delivered by

4th June 1903.

CLARK, C. J.—The first question is, whether this suit, as a suit to set aside the auction sale in execution of decree, would be barred by limitation under Article 12, Schedule II of the Limitation Act as regards Raja Ram, plaintiff.

⁽¹⁾ *I. L. R.*, XXVIII Cal., 427.

⁽²⁾ *I. L. R.*, II All., 241, P. C.

The sale was confirmed on 12th May 1896 and Raja Ram filed his application to sue as a pauper within one year on 8th May 1897.

Defendant objected that he was not a pauper and Raja Ram then (more than one year after the confirmation of the sale) paid in the full Court fees.

Following *Janakdhari Sukul v. Janki Koer* ⁽¹⁾ and *Stuart Skinner v. William Orde* ⁽²⁾, we hold that Raja Ram must be held to have instituted his suit not when he paid in the full Court fee, but on 8th May 1897, when he filed his application for leave to sue as a pauper and his suit is not barred by limitation.

Note.—The Court then proceeded to discuss the case on merits and finally dismissed the plaintiffs' claim.—Ed., P. R.

No. 60.

Before Mr. Justice Reid and Mr. Justice Anderson.

HARI SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

NARAIN SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 451 of 1902.

Promissory Note—Suit on, not presented for payment—Cause of action—Negotiable Instruments Act, 1881, Section 64.

Held, that, under the provisions of the exception to Section 64 of the Negotiable Instruments Act, where a Promissory Note is payable on demand, and not on demand at sight, no presentment is necessary in order to charge the maker or his legal representative.

Malori Mal v. Buta Mal ⁽³⁾ distinguished.

First appeal from the decree of Lala Mukhan Lal, Subordinate Judge, Rawalpindi, dated 19th May 1902.

Ishwar Das, for appellants.

Ganpat Rai and Lal Chand, for respondents.

The judgment of the Court was delivered by

REID, J.—This is an appeal from a decree dismissing a suit 8th May 1903. on a promissory note on the ground that the plaintiff did not disclose a cause of action, not having stated that the instrument

⁽¹⁾ I. L. R., XXVIII Cal., 427. ⁽²⁾ I. L. R., II All., 241, P. C.
⁽³⁾ 148 P. R., 1883.

had been presented or that presentation was unnecessary. *Malori Mal v. Buta Mal* (1), in which it was held that a suit could not be brought to recover on a *hundi* until it had been presented and payment had been objected to or refused, was cited by the Court below.

That authority is not, in our opinion, applicable, the instrument in suit being a promissory note, not a *hundi*.

The instrument is in the following terms: "A sum of "Rs. 6,558-8-0 is due by me as the balance of my "account with I promise that I shall pay the "above amount to the aforesaid or their assignees on "demand, with interest at the rate of 12 annas per cent. per mensem. I have therefore executed this promissory note that it "may serve as an authority," and is dated and signed by the ancestor of the defendant-respondents. The plaint stated demand from, and refusal by, the defendants. A contention by counsel for the respondents based on the following passage at page 250 of Chetty on Bills of Exchange, Edition 11, has no force: "So a promissory note payable on *demand at sight* must "be presented for payment." The instrument in suit was payable on demand, not on demand at sight. The exception to Section 64 of the Negotiable Instruments Act, XXVII of 1881, exempts from the necessity for presentment, in order to charge the maker, promissory notes payable on demand and not payable at a specified place.

Counsel for the respondents contended that the legal representatives of the maker are not governed by this exception, but cited no authority. We see no reason to doubt that the legal representatives of a deceased maker stand in his shoes to the extent of the assets received by them, and we are unable to hold in the absence of any provision to the contrary that the word "drawer" in the section does not include the legal representatives of a drawer.

We decree the appeal, set aside the decree of the Court below, and, under Section 562 of the Code of Civil Procedure, remand the suit to that Court for disposal in accordance with law. Court-fees on the memorandum of appeal will be refunded and costs will be costs in the cause.

Appeal allowed.

(1) 148, P. R., 1883.

No. 61.

Before Mr. Justice Reid.

BAROO AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

Versus

MAKHAN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE,

Civil Appeal No. 81 of 1903.

Hindu Law—Inheritance—Exclusion of nephews by daughter's sons—Custom—Hindu zargars of Dagshai.

In a case the parties to which were non-agricultural Hindu *zargars* trading at Dagshai who had migrated from the Saharanpur District, held, in the absence of a special custom to the contrary that in matters of succession they were governed by the ordinary Hindu Law, and that daughter's sons were consequently entitled to succeed in preference to nephews.

Nihal Singh v. Hira Singh ⁽¹⁾ and *Radha Mal v. Mussammat Kirpi* ⁽²⁾ referred to.

Further appeal from the order of A. E. Hurry, Esquire, Divisional Judge, Umballa Division, dated 17th July 1902.

Lal Chand, for appellants.

Shelverton, for respondents.

The judgment of the learned Judge was as follows :—

REID, J.—The sole question for decision is whether the defendant-appellants who are sons of the daughter, or the plaintiff-respondents who are nephews of the deceased Kewal Ram, are his heirs in respect of two houses in the town or *bazari* of Dagshai. 12th May 1903.

The parties are goldsmiths (*zargars*) whose home is in the Saharanpur District and who went to Dagshai some years ago to trade.

Under these circumstances there is, I think, no doubt that they are governed in matters of inheritance by Hindu Law, in the absence of evidence of special custom. It is, in my opinion, hopeless to contend that the general custom of the Punjab applies to the parties, and the record contains no evidence of special custom governing goldsmiths of the Saharanpur District.

Counsel for the respondents stated that he was instructed that his clients could adduce many instances of nephews taking precedence of married daughters and their sons as heirs, and it is true that the pleader for the appellants was recorded by the

⁽¹⁾ 98 P. R., 1889.

⁽²⁾ 100 P. R., 1901.

Court of first instance to have abandoned the third issue on the 12th September 1901, the date fixed for arguments. That issue was “who are the legal heirs of Kewal Ram.” Issues were framed on the 16th July 1901. On the 27th August all the evidence except that of the seventh witness for the appellants had been recorded, and the 12th September was fixed for the evidence of that witness and for arguments. The abandonment of the issue did not, therefore, mislead the respondents or cause them to dispense with evidence which they might have adduced.’

Nihal Singh v. Hira Singh ⁽¹⁾ is authority for holding that counsel cannot bind a client by an admission on a question of law and the burden of proof on the third issue was not on the defendants who had not to prove a special custom. In *Radha Mal v. Mussammat Kirpi* ⁽²⁾ it was held that non-agricultural Khatri of a village in the Ludhiana District were, in the absence of evidence of special custom, governed by the *Mitakshara*, and in *Mangtu v. Chuni Lal* ⁽³⁾ the same rule was applied to *zargars* of the city of Umballa.

No good purpose would, in my opinion, be served by remanding for decision an issue on the existence of a special custom. I see no reason to doubt that the parties are governed by the *Mitakshara*, under which the appellants are heirs of their grandfather to the exclusion of the respondents.

I decree the appeal with costs of all Courts, set aside the decrees of the Courts below, and dismiss the suit.

Appeal allowed.

No. 62.

Before Mr. Justice Anderson and Mr. Justice Robertson.

HABIBULLA, — (PLAINTIFF),—APPELLANT,

Versus

HABIBULLA AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 435 of 1900.

*Custom—Alienation—Sheikhs of tahsil Attock, Rawalpindi District—
Unequal distribution by father among sons.*

Found, that among Sheikhs of the Attock tahsil in the Rawalpindi District, a father is competent by custom to make an unequal distribution of his estate among his sons whilst he is alive.

Nawab Khan v. Dharat Khan ⁽⁴⁾ and *Nazra v. Sultan* ⁽⁵⁾ referred to.

⁽¹⁾ 98 P. R., 1889. ⁽³⁾ 51 P. R., 1903.

⁽²⁾ 100 P. R., 1901. ⁽⁴⁾ 125 P. R., 1893.

⁽⁵⁾ 64 P. R., 1899.

Further appeal from the decree of Khan Bahadur Sayad Muhammad Latif, Additional Divisional Judge, Rawalpindi Division, dated 26th February 1900.

Ishwar Das, for respondents.

The judgment of the Court was delivered by

ROBERTSON, J.—The parties to this suit are Sheikhs of the Attock *tahsil* of the Rawalpindi District. It is noted at paragraph 125 of Robertson's Settlement Report of the Rawalpindi District that Sheikhs only own six villages in the Rawalpindi District, all in Attock *tahsil*, and are of no tribal importance in the District. Consequently in Robertson's Customary Law of Rawalpindi there are no special answers recorded as having been made by Sheikhs.

1st May 1903.

The plaintiff's father had made a gift of a considerable portion of his estate to the plaintiff's four half brothers, during his lifetime, leaving the plaintiff without any share in this particular gift, though, of course, the plaintiff would share, and has in fact shared, for the father has died since the suit was brought, in the rest of the inheritance. The plaintiff sued for a declaration that the gift shall not affect his interests after the death of the donor.

The answers given by the various tribes in Rawalpindi, as recorded in the answer to Question 54 in Robertson's Customary Law, vary to some extent, but the general drift of them is in favour of the power of a father in his lifetime to make an unequal distribution by gift among his sons, and in this case what has in effect been done is to make such an unequal distribution. It is true that in the gift itself one son, plaintiff, was left out altogether, but he was not in any way cut out of the inheritance, and the action taken would come within the principles laid down in the answer to Question 54. These views have been supported also in various rulings as regards Ghebas in *Nawab Khan v. Darat Khan* ⁽¹⁾, and as regards Alpials in *Nazra v. Sultan* ⁽²⁾. The respondent himself says Sheikh custom corresponds to Koreshi custom, and the Koreshis are recorded as having said that a father can distribute his inheritance unequally. As pointed out in *Nawab Khan v. Darat Khan* ⁽¹⁾, a gift to one son, or to several sons, to the exclusion of other son or sons, made during lifetime, which gift does not wholly disinherit the remaining son or sons, but leaves them to share in the inheritance, is nonetheless a

⁽¹⁾ 125 P. R., 1893.

⁽²⁾ 64 P. R., 1899.

distribution during the lifetime of the father. In *Nawab Khan v. Darat Khan* ⁽¹⁾ it is remarked: "In the present case there has been no disinheriting of plaintiffs; a large property is still left to them, and if we had to consider the reasonableness of the provision made by the parties' father for his sons, we hardly think we should have sufficient reason for finding that the share given to defendant was excessive and that left for plaintiffs unreasonably small. Even if plaintiffs were only to receive their shares on the death of their father, and defendant was also to share with them in the rest of the land, the arrangement was nevertheless a distribution made in the proprietor's lifetime such as is covered by Question 54, and there is no other part of the *Riwaj-i-am* which is applicable."

These observations apply to the present case also. It is now alleged by the appellant that all the best land has been gifted away, but there is nothing on the record to show this, and the appellant had ample opportunity in the lower Courts for proving this if it be true and, having been a patwari, he knew exactly where and how to obtain the necessary proofs. It is further said that the land in question was recovered by litigation, in the expenses of which the donees bore a share, but the appellant did not. There is evidence on the record as to this. It would therefore appear that the gift was not in itself unreasonable. No doubt there is the fact that plaintiff-appellant is the son of one wife, and the donees are the sons of another, which suggests a possible motive for the unequal distribution, but this does not invalidate the gift if it is not invalid on other grounds. The fact appears to be that the countryside recognizes a considerable power of distribution by a father during his lifetime among his sons, whether that distribution amounts to the special selection for an extra portion of one specially meritorious son, or of several; but would not countenance any such distribution as would amount to the practical disinheriting of one or more sons. This is in accordance with the answers generally given to Question 48 of Robertson's Customary Law, and in *Nazra v. Sultan* ⁽²⁾ the learned judge remarked: "The principle which we think should be regarded as applicable in such cases is that, whilst one son may be preferred at the pleasure of the father, he must not be unduly preferred so as to practically disinherit his brethren." We entirely concur in those remarks and would extend them to the circumstances of this case. Here there appears to have been a gift to a number of sons who assisted the father in asserting his

right to this land, the appellant having stood out, and the appellant has quite failed to show that he has been in any way disinherited. Had the gifts not been made it appears that appellant would have got about 458 *kanals*, whereas he will now get about 348 *kanals*. He himself urges that the custom of Sheikhs resemble that of Koreshis and the Koreshis are recorded in the *Riwaj-i-am* as adhering to the principle found to prevail by this Court in the case of Alpials and Ghebas. The evidence does not carry the case much further, as the instances given are not cases among Sheikhs.

On the whole we think that we ought to hold that the power of a proprietor to make an unequal distribution among his sons during life, which certainly obtains among many of the principal tribes of Rawalpindi, and which appears to prevail among those tribes assimilated to the Sheikhs, obtains also among the Sheikhs. It follows therefore that the appeal fails and is dismissed. Each party to bear their own costs in the appeal to this Court.

Appeal dismissed.

No. 63.

Before Mr. Justice Reid and Mr. Justice Harris.

BANDU KHAN AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

MUSSAMMAT UMRI AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 580 of 1900.

Alluvion and diluvion—Title to land transferred by gradual accretion—Custom with respect to land bordering the Sutlej river between Jullundur and Ferozepore Districts—Riwaj-i-am.

Found, that by custom prevailing in respect of land bordering the Sutlej river between the Jullundur and Ferozepore Districts, the proprietors of a village become entitled to any area of land, whether it is the whole or a portion of a village, which, in consequence of a change in the course of that river, is thrown up by gradual accretion,

Held, that, as in the river Sutlej, between the Jullundur and Ferozepore Districts, the changes of deep-stream are more considerable and sudden; that in English and Italian rivers, the rules applicable to gradual accretions of the description contemplated by the English and Roman Law, should not be followed.

All disputes relating to such accretions should be decided by giving full effect to the provisions of the *Riwaj-i-am* of the villages concerned.

Ghulam Mohay-ud-din v. Faiz Bakhsh ⁽¹⁾, *Hashim v. Nathu* ⁽²⁾, *Chunder Bhan v. Ahmad Yar Khan* ⁽³⁾, and *Lopez v. Maddan Thakoor* ⁽⁴⁾, referred to.

Further appeal from the decree of Captain G. C. Beadon, Divisional Judge, Jullundur Division, dated 27th March 1900.

Ram Chandra, for appellants.

Beechey, for respondents.

The judgment of the Court was delivered by

28th March 1903.

REID, J.—The facts are stated in the judgments of the Courts below.

The plaintiff-respondents are proprietors of the village Mahliwal, and the defendant-appellants are proprietors of the village Khiali, south of Mahliwal.

Until 1892-93 the river Sutlej flowed between the two villages, which were in the Jullundur and Ferozepore Districts, respectively, and for some years previously had encroached on Khiali, leaving portions of the land in suit dry.

In 1891-92 the whole of the land in suit, rather more than a mile broad from north to south, was left dry, and in the next year the river left its bed south of Mahliwal and flowed to the north of that village, leaving its previous bed dry. The changes of bed until 1892-93 were fluctuating, the river advancing in one year and receding in another, but the first actual diversion of course occurred in 1892-93. The *Riwaj-i-am*, which governed both villages in the years in question, ran as follows: "Between our villages, in both the *tahsils*, the following custom comes down to us from the very beginning. The land which is carried away slowly and appears on the other side of the deep stream, and the land which is washed away in parcels and loses pre-existing marks becomes the property of the person in front of whose village it may appear. The lands which show all marks are not to be treated as appearing after diluvion—their case is dealt with in answer 2. If an entire village is thus gradually washed away and appears again on the other side of the main stream it will be included in the village in front of which it has appeared and to which it has been added, and will not be given to the original owners.

(¹) 97 P. R., 1902.
(²) 13 P. R., 1900.

(³) 36 P. R., 1898.
(⁴) 5 Beng. L. R., 521, P. C.

“Paragraph 2. The land which, in consequence of sudden diversion (*rukhl gardani*) of the river goes bodily away from one *tahsil* to the other is called *gatti* or *chak*, and the person who may have been its owner before such diversion is considered to be the owner of the said *gatti*.”

Gradual accretions of the description contemplated by the English and Roman Law do not usually occur in the Sutlej between the Jullundur and Ferozepore Districts, where the changes of deep-stream are more considerable and sudden, and the *Riwaj-i-am* must, in our opinion, be held to contemplate such changes as are experienced in the tract governed by it.

A distinction is drawn between such changes as occurred before, and the complete diversion which occurred in 1892-93, and the former must, in our opinion, be treated as gradual and as entitling the Mahliwal proprietors to the land in suit. It has not been contended that the land thrown up is identifiable by any special marks as the land submerged. The facts differ materially from those dealt with in Further Appeal 1378 of 1898, and in that case, moreover, it was held that no local usage existed. In *Ghulam Mohay-ud-din v. Faiz Bakhsh* (1) it was held that the *Wajib-ul-arz* relied on as establishing special custom was a one-sided entry opposed to all principles of law and equity.

In *Hashim v. Nothu* (2) a special custom was dealt with, while the facts here are distinguishable from those in *Chunder Bhan v. Ahmad Yar Khan* (3), and the rule laid down in *Lopez v. Maddan Thakoor* (4) is not applicable in the face of the *Riwaj-i-am*. The accretion up to 1892-93 having been gradual within the terms of that document, is not affected by the subsequent sudden diversion. The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 64.

Before Sir William Clark, Kt., Chief Judge.

RAM SARN DAS,—(DEFENDANT),—APPELLANT,

Versus

MULA SINGH,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 457 of 1903.

Custom—Pre-emption—Mouza Kotti Kanjran, Gurdaspur District—Relationship—Wajib-ul arz.

Plaintiff claimed a right of pre-emption of certain land situated in mouza Kotti Kanjran, *tahsil* Gurdaspur, arising out of a sale by defendants

} APPELLATE SIDE.

(1) 97 P. R., 1902.

(2) 36 P. R., 1898.

(3) 13 P. R., 1900.

(4) 5 Beng. L. R., 521, P. C.

Nos. 2 and 3 in favour of defendant No. 1, on the ground of his relationship to the vendor, and based his claim upon entries in the *Wajib-ul-arz* of the village prepared in 1852. These entries were to the effect that no sale or mortgage of land had ever occurred in the village and then prescribed that every co-sharer was thenceforward to be at liberty to mortgage or sell for necessity or to pay arrears of Government revenue, but that he should make the first offer of it to the *karabatian* and after that to the co-sharers in the *patti*. The facts found were that, although there had been more than 51 sales in the village, in no case had the right of pre-emption based on relationship in accordance with the provisions of the *Wajib-ul-arz* been asserted or allowed.

Held, that no custom of pre-emption based on relationship had been proved to exist in the village. The entries in the *Wajib-ul-arz*, never having been acted on or the right exercised in accordance therewith, were not sufficient to establish the custom set up.

Masta v. Pohlo ⁽¹⁾ and *Dilsukh Ram v. Nathu Singh* ⁽²⁾ distinguished.

Jafar Khan v. Fazal Mohi-ud-din ⁽³⁾ and *Jiwa v. Mussammatt Bhari* ⁽⁴⁾ referred to.

Further appeal from the decree of H. Scott Smith, Esquire, Divisional Judge, Amritsar Division, dated 5th July 1901.

Sohan Lal, for appellant.

Golak Nath, for respondent.

The judgment of the learned Chief Judge was as follows:—

15th May 1903.

CLARK, C. J.—This is a pre-emption suit as regards two plots of land, one in *mouza* Shahzada Nangal and one in Kotli Kanjran, both villages in *taluk* and District Gurdaspur. Plaintiff's claim is strongest as regards the plot in Kotli Kanjran and the decision as regards that plot must govern the decision as regards the other plot.

Plaintiff's claim is based on his relationship to the vendor and rests on the entry in the Kotli Kanjran *Wajib-ul-arz* prepared in 1852, which runs as follows:—

“ Fil hal is gaun men kisi malik ki hakiyat bai wa rahu
“ nahin hai, agar aunda ko ba zarurat zati, ya baqi sarkar, har
“ ek malik ko ikhtiyar bai rahu ka hasil hai, magar awal hak
“ karabatian ba kimat mukarra penchon, bad men hath
“ shurkayan patti.”

(1) 52 P. R., 1896.

(2) 93 P. R., 1894, F. R.

(3) 44 P. R., 1892.

(4) 92 P. R., 1892.

The Divisional Judge has held, following *Masta v. Pohlo* ⁽¹⁾, that the entry in the *Wajib-ul-arz* must be deemed sufficient proof of the custom in the absence of evidence to the contrary, and that the contrary had not been proved.

It has been shown that there have been 51 sales of land in Kotli Kanjran between 1866 and 1898, and of these all except six were to strangers. In two cases it appears sales made to strangers or non-proprietors were questioned by proprietors and the latter got the land sold. No case appears to have been decided in which preference was given to a pre-emptor on the ground that he was related to the vendor.

This at once distinguishes the case from *Masta v. Pohlo* ⁽¹⁾, where the alienation in dispute was the first of its kind that had occurred in the village, and it was held that the entry in the *Wajib-ul-arz* had therefore not been rebutted. That case followed *Dilsukh Ram v. Nathu Singh* ⁽²⁾, in which also there had been no alienations subsequent to the entry in the *Wajib-ul-arz* and the possible rebuttal of the entry by subsequent undisputed alienation was considered, Sir M. Plowden saying, page 355:

"This seems to me *prima facie* proof, in the absence of any evidence to the contrary, such as might easily have been produced if it existed (as, for instance, evidence of mortgages without any claim of pre-emption being preferred), that in 1891 a co-sharer in this village was still incompetent to mortgage his share without the assent of the other co-sharers."

Jafar Khan v. Fazal Mohy-ud-din ⁽³⁾ and *Jiva v. Mussamat Bhari* ⁽⁴⁾, the former from the Amritsar Division, are cases in which a similar entry in the *Wajib-ul-arz* was not held sufficient to establish the custom.

The position then is this, that prior to 1852 in this village there had been no sales. Since 1852 there have been more than 51 sales and in no case has the right of pre-emption on account of relationship been established. It is impossible to hold under such circumstances that there is a custom of pre-emption based on relationship in the village.

I accept the appeal and dismiss plaintiff's suit with costs throughout.

Appeal allowed.

⁽¹⁾ 52 P. R., 1896.

⁽³⁾ 44 P. R., 1892.

⁽²⁾ 98 P. R., 1894, F. B.

⁽⁴⁾ 92 P. R., 1892.

No. 65.

Before Mr. Justice Reid.

MAHA RAM AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

RAM MOHAR,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 269 of 1902.

Custom—Pre-emption—Mouza Chhara, District Rohtak—Preferential right—Relationship—Burden of proof.

In a suit for pre-emption of a house situate within the *abadi* of Chhara in the District of Rohtak, *held*, that under the terms of the *Wajib-ul-arz* of the village, the plaintiff, a Jat and a near agnate of the vendor, had a right of pre-emption superior to that of a Mahajan who was only a shareholder in the village.

Burden of proof that any existing custom has been incorrectly stated in a record of rights rests on the person making such assertion.

*Miscellaneous appeal from the decree of S. Clifford, Esquire,
Divisional Judge, Delhi Division, dated 8th April 1902.*

Turner and Shadi Lal, for appellants.

Lachmi Narain, for respondent.

The judgment of the learned Judge was as follows:—

22nd April 1903.

REID, J.—The facts are stated in the judgments of the Courts below.

The question for consideration is whether the plaintiff-respondent, a Jat has, in virtue of being a near agnate of the vendor, the right to pre-empt from the purchaser, a mahajan, a house situate in the village *abadi*. Both are shareholders in the village.

I concur with the learned Divisional Judge in the conclusion that the record of rights of the village, transliterated in his judgment, gives a right of pre-emption to relations of the vendor and that no other interpretation would make sense of the passage relied on. It would be absurd to say that those entitled to pre-emption may take and on their refusal *liswaders* in the *thulla* or *pana* may take.

It has not been seriously contended that the passage dealing with pre-emption in the 1842 record of rights was repealed or cancelled by the 1879-80 record of rights, and I hold that it is still in force.

As remarked by Plowden, S. J., in *Dilsukh Ram v. Nathu Singh* ⁽¹⁾, it is open to any person to show that any existing custom has been incorrectly represented in a record of rights by others or even by himself, but the burden of showing that it differs from what is stated by common consent is fairly placed upon him. This burden has not, in my opinion, been discharged by the appellant.

I see no reason to hold that the pre-emptive right provided by the passage cited refers only to agricultural land. The word used is *zamin* and includes, in my opinion, buildings on land. It would, in my opinion, be erroneous to hold, on the evidence on the record, that the pre-emptive right does not extend to houses in the village *abadi*. Both sides have adduced evidence, and certain sale-deeds have been relied on for the appellant, but, as above remarked, the latter has not discharged the burden of proving that the custom is not correctly stated in the record of rights. It has not been shown that the four sales of 1898, 1899, 1901 relied on for the appellant raise even a *prima facie* presumption against the accuracy of that record.

Further inquiry is, in my opinion, unnecessary.

The appeal fails and is dismissed with costs.

Appeal dismissed.

Privy Council.

No. 66.

Present:

LORD MACNAGHTEN,
LORD DAVEY,
LORD ROBERTSON,
LORD LINDLEY,
SIR ANDREW SCOBLE, AND
SIR ARTHUR WILSON.

RAHIM-UD-DIN AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

REWAL,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Pre-emption—Village owned by a single proprietor—Sale of whole village to stranger—Suit by occupancy tenants in the village—Punjab Laws Act, 1872, Sections 10, 12—"Village community."

Held, that the expression "village communities" in Section 10 of the Punjab Laws Act, 1872, as amended by Act XII of 1878, is not used to

(1) 98 P. R., 1894, F. B.

denote a village community of the typical sort consisting of members of one family or one clan holding the village lands in common and dividing between them the agricultural lands according to the custom of the village, but is used in a popular sense to denote a body of persons bound together by the tie of residence in one and the same village, amenable to the village customs and subject to the administrative control of the village officers.

A village community is not confined to the landowners in the village. Occupancy tenants are therefore members of a village community within the meaning of the Punjab Laws Act, and so are all persons in an inferior position who belong to the village, though they may be unconnected with the land and not entitled to any right of pre-emption under the Act.

Appeal from a decree of the Chief Court, Punjab (Chatterji and Stogdon, JJ.), dated 12th April 1897.

Sir W. Rattigan, K. C., and C. W. Arathoon, for appellants.

The facts of the case are fully stated in the judgment of their Lordships delivered by

25th March 1903.

LORD MACNAGHTEN.—This is an appeal *ex-parte* against a decree of the Chief Court of the Punjab pronounced in favour of the respondents who were plaintiffs in the suit.

The respondents are occupancy tenants in the village of Manda Khera, a *zamindari* village owned by a single proprietor. On the death of the owner in 1892 the village was sold under the authority of a declaration of trust and sold to a stranger. Thereupon the respondents taking their stand on Act XII of 1878, an Act passed for the purpose of amending the Punjab Laws Act, 1872, claimed pre-emption of the whole village. There was no preferential claim.

It was not disputed at their Lordships' Bar that there would be no answer to the claim of the respondents if the provisions of the Act of 1878 apply to the case. It was, however, contended on behalf of the purchaser, who was a defendant in the suit and is now represented by the appellants, that the respondents cannot claim the benefit of the Act because, although Manda Khera is a village, no village community is to be found in it.

The argument was mainly founded on Section 10 of the Act of 1878. The provisions with regard to pre-emption begin with Section 9. Section 9 declares that "the right of pre-emption is a right of the persons hereinafter mentioned or referred to to acquire in the cases hereinafter specified immovable property in preference to all other persons." The section goes on to explain that the right arises in respect of sales and foreclosures.

Section 12 declares that "if the property to be sold * * * is "situate within * * * a village the right to buy * * * "belongs, in the absence of a custom to the contrary," to certain classes of persons therein described in succession one after the other. Among them in the sixth place come "the tenants (if any) with rights of occupancy in the property," and seventhly "the tenants (if any) with rights of occupancy in the village."

Those two sections—Sections 9 and 12—taken together seem to be complete in themselves and plain enough. But between them are Sections 10 and 11. It is Section 10 which creates or is supposed to create the difficulty. It declares that "unless the "existence of any custom or contract to the contrary is proved, "such right" that is the right of pre-emption "shall, whether "recorded in the Settlement record or not, be presumed—

"(a) To exist in all village communities however constituted."

Section 11 declares that the right "shall not be presumed to "exist in any town or city or any sub-division thereof, but may "be shown to exist therein."

The argument, as their Lordships understood it, was to this effect. Before the benefit of the provisions of Section 12 can be invoked, the existence of a right of pre-emption must be either presumed or proved. In villages the right is presumed to exist if there be a village community, but if that condition is wanting there must be proof of custom. In the present case there is no evidence of custom at all. There can be no village community because the whole village was in the hands of a single proprietor. Two persons at least are required to make a community, and they must be landowners. The result of this argument would be that the rights of occupancy tenants would be made to depend on the question whether the village belonged to one or more than one landowner, a matter which does not of itself seem to affect or concern the position of the tenant in relation to strangers whose exclusion is aimed at by the law of pre-emption. There is certainly ground for contending that the generality of Sections 9 and 12 is not cut down by Sections 10 and 11. These Sections apply a different rule in the case of villages from that which is applicable in the case of towns and cities. And it may well be that they were not intended to do more, though no doubt the introduction of the expression "village communities" where the expression "villages" would suffice does introduce an element

of obscurity. It is not, however, necessary to pursue this subject further or to determine the point, because their Lordships agree with the Chief Court in thinking that the expression "village communities" in the Act of 1878 is not used to denote a village community of the typical sort consisting of members of one family or one clan holding the village lands in common and dividing between them the agricultural lands according to the custom of the village. It seems rather to be used in a popular sense to denote a body of persons bound together by the tie of residence in one and the same village, amenable to the village customs and subject to the administrative control of the village officers. There seems to be no reason why a village community should be confined to the landowners in the village. In their Lordships' opinion occupancy tenants are members of a village community within the meaning of the Act, and so are all persons in an inferior position who belong to the village though they may be unconnected with the land and not entitled to any right of pre-emption under the Act of 1878. That was the view of the learned Judges in the Chief Court, and their Lordships see no reason to differ from them.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed.

Appeal dismissed.

Privy Council.

No. 67.

Present :

LORD MACNAGHTEN,
LORD ROBERTSON,
LORD LINDLEY,
SIR ANDREW SCOBLE, AND
SIR ARTHUR WILSON.

MUHAMMAD AFZAL KHAN,—(DEFENDANT),—
APPELLANT,

Versus

GHULAM KASIM KHAN,—(PLAINTIFF),—RESPONDENT.

Chief of Tank—Succession—Inheritance—Family custom—Primogeniture—Right of junior members of the family.

On the [death of a Chief of Tank the question arose whether by a family custom the entire estate descended to the Chief for the time being as head of the family and by virtue of his Chiefship or devolved according to the general custom of Jat agriculturists in the Panjab to be held jointly

APPELLATE SIDE. }

by the sons or their issues in equal shares, each having the right to claim partition. It was proved that the succession to the Chiefship went always in the line of primogeniture except in one instance in which the eldest son was set aside on the ground of insanity and that with the Chiefship went the ownership of the lands of the *ilaga*.

Held, that the whole estate known as Tank proper belonged to the Chief for the time being who was both ruler and proprietor, and that succession devolved upon the eldest son of the Chief, the other members of the family being entitled to maintenance only.

Appeal from a decree of the Chief Court, Punjab (Stogdon and Reid, JJ.), dated 3rd January 1898.

The facts of the case are fully stated in the judgment of their Lordships delivered by

SIR ANDREW SCOBLE.—Shah Nawaz Khan, Nawab of Tank, died on the 10th January 1882, leaving him surviving a grandson Ghulam Kasim Khan (the son of his elder son Muhammad Akbar, who had predeceased him) and a son Muhammad Afzal Khan. At the time of the Nawab's death, the grandson was thirteen years of age, and the son about twenty-three years old. Upon their joint application, the Nawab's estate was transferred into their two names, as proprietors in equal shares; but this mutation is not relied on, as Ghulam Kasim Khan was then a minor, and the Nawab having died in debt the management of his property was undertaken by the Court of Wards. 15th May 1903.

On the 6th October 1882, the Government of India sanctioned the appointment of Ghulam Kasim Khan, the grandson of the late Nawab, to be the successor "to the title and position of Nawab and Chief of Tank, and also to the entire jagir and cash assignment enjoyed by the late Nawab," subject to a deduction of certain emoluments "for the maintenance of the son and the two widows left by Shah Nawaz Khan."

The young Nawab attained his majority in 1892, and the estate was released from the superintendence of the Court of Wards. His uncle thereupon claimed partition, basing his claim on the mutation proceedings, but the Revenue Court declined to enter into the question of title, and referred the parties to the Civil Court. The present suit was therefore instituted in February 1894, the respondent being plaintiff and the appellant defendant. The claim was to recover the half share of Shah Nawaz's property entered in the defendant's name in 1882, on the ground that "according to the custom and the practice of the family" the whole of it belonged to the

Chief for the time being, as head of the family and by virtue of his Chiefship. The defendant, in his written statement, denied the custom, and asserted that "in matters relating to succession the parties' family has always been bound by Muhammadan Law." It is now admitted that the Muhammadan Law does not apply, and that the decision of the claim depends upon the custom existing in the family—that is to say, whether the estate goes with the Chiefship, as alleged by the plaintiff, or devolves according to the custom of the district, under which, the defendant asserts, the property would be divided between the son and grandson of the late Nawab in equal shares.

The District Judge found that the plaintiff had failed to prove the special custom alleged by him, and dismissed the suit. The Chief Court of the Punjab, on appeal, reversed this decision, and gave the plaintiff a decree for possession of defendant's recorded half share in seven villages, *viz.*, (1) Tank, (2) Hayat, (3) Budha, (4) Baloch, (5) Kaura, (6) Daggar, and (7) Rukh Ranwal. As to an eighth village, Dabarra, the Court gave the plaintiff a decree for possession, "with this proviso that the decree will not be executable if, within six months from this date, defendant renounces all claim to the allowance of Rs. 5,000 *per annum* made to him by Government out of plaintiff's grant. If he either refuses or fails to renounce such claim within such period, then plaintiff will be entitled to execute his decree." The present appeal is against both branches of this decree.

A great body of evidence, both oral and documentary, was adduced as to the history of Tank and its rulers prior to the British annexation of the Punjab, from a consideration of which the Chief Court arrived at the following conclusions:—

"1. The country known as Tank proper belonged to the Chief for the time being, who was both ruler and proprietor."

"2. Succession devolved upon the eldest son of the Chief, the members of his family being entitled to maintenance only."

In these conclusions their Lordships concur. The history of the Chiefs of Tank, as shown in this record, was marked by many vicissitudes. Originally independent they became tributary in turn to the Afghans and the Sikhs; they were sometimes in power, and sometimes in exile, but so far as the evidence extends, the succession to the Chiefship went always in the line of primogeniture, except in one instance in which the eldest son was

set aside on the ground of insanity. And with the Chiefship went the ownership of the lands of the *ilaqa*. As Sir John Lawrence observes, in a Memorandum of 17th March 1854, "Previous to the expulsion of the father of Shah Nawaz, he was "virtually the Chief and the landed proprietor of the whole of Tank. All other classes had been reduced to complete "subjection."

When the settlement of the country was made, after the introduction of British rule in 1849, it was the policy of the Government to recognise the occupiers of the soil as the proprietors of their respective lands; and although Shah Nawaz Khan asserted a proprietary title, by virtue of his Chiefship, to all the villages, sixty-seven in number, which formed the Pergunnah of Tank, his claim was eventually admitted in regard to seven only, *viz.*, (1) Tank, (2) Baloch, (3) Budha, (4) Kaura, (5) Hayat, (6) Daggar, and (7) Dabarra. These are the villages now in dispute; the eighth, Rukh Ranwal, being a tract of grass land used for grazing horses and appurtenant to Tank. Their Lordships agree with the Chief Court that the effect of this settlement was not to create a fresh estate subject to the ordinary law of inheritance, but to continue to the Chief for the time being, as it were *jure coronae*, the proprietorship of the villages which had been founded by his ancestors, and the succession to which had theretofore been regulated by the custom of the family.

This view is supported by what took place in 1875, when, as the result of considerable negotiation, the Government of India conferred upon Shah Nawaz Khan, as an hereditary jagir, a cash allowance of Rs. 25,000 *per annum*, together with the land revenue of the seven villages abovementioned, to be "held "on condition of good service, and descend from the Nawab "integrally to the successor in the direct male line who may be "selected by the Government as most competent." In sanctioning this grant the Governor-General in Council expressly recognised that "the status accorded to the occupiers of the soil "under the Regular Settlement could not be altered, and accordingly made no change in the position in which the Nawab already stood in regard to the proprietorship of these villages, as distinguished from their liability to payment of Government revenue.

Upon the terms of this arrangement being communicated to Shah Nawaz Khan, he "expressed a wish that separate "provision might be made for his younger son, Muhammad

"Afzal Khan, in the event of the elder son, Muhammad Akbar Khan, being selected by Government to succeed him as Nawab and jagirdar at a future time"; and he was informed, in reply, that "he himself had always stated it to be the rule in the Katti Khel family that the head of the family should alone arrange what provision should be made for junior members. Such being the case, the authorities saw no cause to deviate from what was acknowledged by the Nawab himself to be the recognised and established custom of his house." In pursuance of this suggestion, Shah Nawaz Khan, on the 23rd June 1876, applied to the Settlement Officer that the name of his son, Muhammad Afzal Khan, should be entered as proprietor of the village of Dabarra, "so that he may remain in possession of it and enjoy the whole of its produce, while I will have nothing to do with the village"; and the order upon this application was "that an entry should be made according to the request of the Nawab, who, in the capacity of a jagirdar, will hold the village as before." The Chief Court held that under these proceedings, Dabarra became "an appanage conferred on defendant as a younger son of a Chief for his subsistence, and as such he is entitled to keep it"; but the learned Judges considered that as the Government, on the death of Shah Nawaz Khan, transferred Rs. 5,000 of his cash allowance to the defendant, they were "entitled to call upon the defendant to elect which maintenance he will take, that provided by his father, or that provided by the Government." Their Lordships can discover no ground for putting the defendant to this election; the cash allowance and the assignment of the village arise from different sources, and are independent of each other; and without expressing any opinion as to the permanency or otherwise of the alienation of Dabarra, their Lordships consider that, as regards Dabarra, the conditions imposed by the decree of the Chief Court cannot be supported.

Their Lordships will humbly advise His Majesty that the decree of the Chief Court, so far as it directs that the plaintiff should receive possession of defendant's recorded half share in the villages of (1) Tank, (2) Hayat, (3) Budha, (4) Baloch, (5) Kaura, (6) Daggar, and (7) Rakh Ranwal be confirmed and the appeal dismissed; and so far as it relates to possession of Dabarra that the appeal should be allowed, and the defendant declared entitled to the benefit of the grant of the village for his maintenance made by Shah Nawaz Khan without renouncing his claim to the allowance of Rs. 5,000 per annum made to him

by Government; and that in other respects the decree of the Chief Court should be confirmed. As the respondent has succeeded as to the greater part of his claim, the appellant must pay to the respondent three-fourths of his costs of this appeal, and the respondent must pay to the appellant one-fourth of his costs thereof with the usual set-off.

No. 68.

Before Mr. Justice Chatterji.

BHUPA AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

Versus

NIGAHIA AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 773 of 1902.

Alienation by Jat proprietor—Gift in favour of sister's son—Suit by a reversioner to declare the gift invalid and not to be binding after the donor's death—Donee setting up his own adoption as a bar to the suit—Limitation Act, 1877, Schedule II, Article 118.

Held, that the term "adoption" in Article 118 of Limitation Act includes a customary appointment of an heir and that the failure to sue within the period provided by that Article for a declaration that an alleged adoption was invalid or had never taken place is fatal to a suit in which the validity of such adoption comes into question.

The knowledge of the factum of an adoption by the father or ancestors of the reversioner objecting to it, and his or their omission to sue within limitation, prevents the reversioners from again raising the question of its invalidity.

Jagan Nath Prasad Gupta v. Ranjit Singh ⁽¹⁾ and *Lali v. Murli Dhar* ⁽²⁾ dissented from.

Shrinivas Murar v. Hanmant ⁽³⁾, *Parvathi Ammal v. Saminatha Gurukul* ⁽⁴⁾, *Gujar Singh v. Puran* ⁽⁵⁾, *Hamraj v. Sahiba* ⁽⁶⁾, and *Daneshu Singh v. Nathu* ⁽⁷⁾ followed.

Roda v. Harnam ⁽⁸⁾, *Valiappu Nayar v. Piru Nethiar* ⁽⁹⁾, and *Dal v. Bugh Singh* ⁽¹⁰⁾ distinguished.

†*Mussammat Lorindi v. Mussammat Kishen Kour* ⁽¹¹⁾, *Mussammat Fakir-unnissa v. Malik Rahim Bakhsh* ⁽¹²⁾, and *Mussammat Pal Deri v. Fakir Chand* ⁽¹³⁾ referred to.

⁽¹⁾ I. L. R., XXV Cal., 354.

⁽²⁾ I. L. R., XXIV All., 195.

⁽³⁾ I. L. R., XXIV Bom., 260.

⁽⁴⁾ I. L. R., XX Mad., 40.

⁽⁵⁾ 71 P. R., 1901.

⁽⁶⁾ 116 P. R., 1901.

⁽⁷⁾ 20 P. R., 1902.

⁽⁸⁾ 18 P. R., 1895, F. B.

⁽⁹⁾ 9 Mad. L. J. R., 196.

⁽¹⁰⁾ 34 P. R., 1883, F. B.

⁽¹¹⁾ 149 P. R., 1888.

⁽¹²⁾ 23 P. R., 1897.

⁽¹³⁾ 60 P. R., 1895.

Further appeal from the decree of Khan Sahib Moulvi Muhammad Hussain, Divisional Judge, Jullundur Division, dated 25th August 1902.

Beechey, for appellants.

Madan Gopal, for respondent.

The judgment of the learned Judge was as follows:—

8th May 1903.

CHATTERJI, J.—This is a suit for a declaratory decree that a gift of land by defendant Bhupa, a Jat proprietor of Kot Kalan in Jullundur District and *tahsil*, in favour of the other defendant Kabul, made on 3rd May 1899, is invalid by custom, and will not affect plaintiffs' reversionary rights. Plaintiffs are first cousin's sons of Bhupa, while Kabul is the son of his sister's son.

The defence was that Kabul was adopted from his infancy by Bhupa, who on 25th June 1894 wrote and registered a deed affirming his adoption and his right of succession, and that a gift to the adopted son is valid and plaintiffs are not competent to object, and that the adoption cannot be challenged by the plaintiffs as their right to do so has become barred by lapse of time.

The first Court found that the adoption could not be disputed as the suit was instituted more than six years after the execution of the deed of 1894. It also held that the adoption was valid by custom. It therefore dismissed the suit.

The Divisional Judge reversed this decree on the ground that Roda, plaintiffs' father, had no knowledge of the adoption; that he could not have sued to set aside the deed which was in the nature of a will, and that the adoption was invalid by custom, the *onus* of proof of its validity being on the defendants according to the authorities of this Court and the *Rivaj-i-am* being also against it. The defendants in appeal contend that the claim is barred by time and that the weight of evidence proves that the adoption is valid by custom.

The reply on behalf of the respondents is, (1) that Article 118 of the Limitation Act has no application as it applies to adoptions properly so-called under Hindu Law, whereas that set up here is a mere customary appointment as heir; (2) that even if it is held to apply, there is no concurrence of the Indian High Courts as to whether the lapse of time for a claim under that section bars claims based on other grounds; (3) that

under customary law plaintiffs do not derive their right to sue from their father and hence cannot be barred by knowledge of the adoption on the part of their father, even if it is proved; (4) that such knowledge is not proved and no suit could have been instituted by him to set aside the deed which is a will; and (5) lastly that the *onus* of proof of validity of the adoption lies on the defendants and they have failed to discharge it.

These contentions were extremely ingenious and I therefore took time to consider my judgment. With reference to the first point I am of opinion that it is not substantiated. The word adoption has not been defined in the Limitation Act and we should therefore understand it in its ordinary and popular acceptance. I am prepared to admit that Article 118 postulates that the adoption is recognized by the personal law of parties among whom it has been made or is the subject of contest. It is presumably not applicable to an adoption which has no legal effect under such personal law, as for instance where it has been made by a Muhammadan governed by Muhammadan Law. In such a case the act does not give rise to any legal relation between the adopter and the adopted, nor to any legal right in the latter. To such an adoption the Article can have no application. It is also true that among such Muhammadan adoption has no meaning whatever popular or otherwise. *Valiappan Nayar v. Parn Nethiar* ⁽¹⁾ has very special features of its own being a case of female adoption and does not help the construction contended for by the respondents.

But it does not follow from the above that the word cannot be applied to customary appointments as heir so that the article does not apply to them at all. The word is popularly applied to them and is so used in judgments of this Court. It is not perhaps absolutely clear that the present is a case of such appointment. The allegation is that the adoption took place in the infancy of Kabul and with ceremonies before the brotherhood, and there is a deed reciting the above facts and declaring the affiliation and providing that Kabul will perform the funeral ceremonies of the adopter. Among Sudras, to which caste the parties belong, such an adoption is perfectly valid by Hindu Law. Further the personal law of the parties is Hindu Law, though it is postponed to any custom on the subject that may be proved to exist. This part of the argument would have had a greater show of force had the parties been Muhammadans, though I am not to be supposed

(1) 9 Mad. L. J. R., 190.

to be giving any opinion on this point. The scheme of Section 5 of the Punjab Laws Act appears to be that Hindus in the Punjab are assumed to be governed by Hindu Law, and Muhammadans by Muhammadan Law, but it is provided that the first rule of decision is custom to which necessarily the Court's attention must first be directed. But the frame of the section and numerous authorities of this Court lay down that the party who sets up a custom at variance with his personal law has to prove its existence, see *Mussammat Lorindi v. Mussammat Kishen Kour* ⁽¹⁾, *Mussammat Pal Devi v. Fakir Chand* ⁽²⁾ and *Mussammat Fakhirunnissa v. Malik Rahim Baksh* ⁽³⁾, and clause (b) speaks of customs mentioned in clause (a) as modifying such personal law. As the forms of adoption under the personal law may vary and may be affected by the ideas of the people of the locality where the adoption is made, it is not a straining of the meaning of the word in Article 118, in my opinion to hold that it covers what are called customary appointments of heirs in the Punjab. The word cannot be interpreted to denote a particular form of adoption with particular ceremonies, and the construction I have suggested above does not seem unreasonable.

It is true that Sir William Rattigan in the opening remarks of Chapter III of his Digest of Customary Law considers that the words "appointment of an heir" are more appropriate for customary adoptions in the Punjab than the word "adoption," but this does not bear on the question of interpretation of the latter term in the Limitation Act.

In *Dad v. Bajh Singh* ⁽⁴⁾, it was ruled that for purposes of succession to occupancy rights under the former Tenancy Act, an adopted son among persons whose personal law permits adoption, can succeed as a "male lineal descendant" of the tenant under the terms of Section 36, but that an appointed heir cannot. This, however, is an interpretation of the word "son" in clause 19, Section 2 of the old General Clauses Act, 1868, which need not necessarily be imported into the Limitation Act and which was presumably influenced by the general considerations affecting the Tenancy Act. It was also not cited by counsel in support of his contention, as it would probably have been, had it really helped him. It is, perhaps, more in point to quote the language of Section 5 (a) of the Punjab Laws Act, with which we are more nearly concerned. There the word adoption

(1) 149 P. R., 1888.

(2) 60 P. R., 1895.

(3) 23 P. R., 1897.

(4) 34 P. R., 1883, F. B.

alone is used, and I should think there cannot be much doubt that it is there used in a comprehensive sense and covers the customary appointment of an heir. The object of enacting the section in that form was to give the fullest scope to the recognition of the customary law of the Punjab, and it was at the instance of Sir George Campbell, who had served in the Province and knew the people well, that the language of the section was put in its present form. Sir George was presumably well acquainted with the customary appointments of heirs which are mentioned in very early judicial decisions after the introduction of British rule in this Province. If we hold the word adoption not to cover such appointments the whole section becomes inapplicable to them, and we are driven to fall back on Section 6 for a rule of decision. This is an almost absurd conclusion and has certainly never been followed by the Courts in this Province. As already stated, it is an every day occurrence to see enquiries into *custom* in cases of such appointments under clause (a) of Section 5. It is also a matter of every day experience that in Urdu deeds the word *mutbanna*, the equivalent of adoption, is indiscriminately applied to both the formal religious adoption under Hindu Law and the customary appointment of an heir.

Moreover, even under Hindu Law adoptions are of various kinds, though the *dattaka* form is the usual one, and the *Kritrima* form, which is somewhat akin to the Punjab appointment of heir, is not alleged to be excluded from the operation of Article 118. I therefore hold the term adoption in Article 118 of the Limitation Act includes customary appointments of heirs.

On the second point urged for the respondents, it is true that the High Courts in India are not agreed that the failure to sue under Article 118 or 119 is fatal to a suit for recovery of property from the hands of the adopted son after the lapse of the time fixed in the article, as their Lordships of the Privy Council have ruled under Article 129 of the Limitation Act of 1871. The Calcutta and the Allahabad Courts are agreed that such failure does not create a bar—*Jagan Nath Prasad Gupta v. Ranjit Singh* ⁽¹⁾, and *Lali v. Murli Dhar* ⁽²⁾, while the Bombay and Madras Courts have ruled that it does—*Shrinivas Murar v. Hanmant* ⁽³⁾, *Parvathi Ammal v. Saminatha Gurukul* ⁽⁴⁾. Our Court has ruled in three published cases in

⁽¹⁾ *I. L. R.*, XXV Cal., 354.

⁽³⁾ *I. L. R.*, XXIV Bom., 260.

⁽²⁾ *I. L. R.*, XXIV All., 195.

⁽⁴⁾ *I. L. R.*, XX Mad., 40.

accordance with the view of the latter Courts, see *Gujar Singh v. Puran* ⁽¹⁾, *Hem Raj v. Sahiba* ⁽²⁾, and *Ganesh Singh v. Nathu* ⁽³⁾. With reference to these rulings and having regard to the expression of opinion of their Lordships on the point in *Mohesh Narain's* case ⁽⁴⁾ I decide that the failure to sue for a declaration under the article is fatal to the present claim.

As regards the third contention I am not prepared to agree that plaintiffs are not barred by the knowledge of their father Roda that the adoption had been made, and his omission to sue to set it aside. This is not a suit for land, and *Roda v. Harnam* ⁽⁵⁾ is not directly in point, nor the principle accepted in it that the right to sue is derived from the common ancestor. The right to contest the adoption in the capacity of the heir presumptive does not depend on the land being ancestral. The argument therefore has no force, but even if we concede that the right to sue in such cases is derived from the common ancestor, the plaintiffs, who derive it, though their father must be bound by his acts and omissions with reference to such right. If Roda had sued and lost plaintiffs would have been bound by the result of the decision. So also if he has lost his right to object by omission to sue within limitation, plaintiffs cannot raise the question again. The Full Bench case turned upon the question of adverse possession as well as the right to sue to set aside the alienation not being derived from the alienor. The questions in this case are not identical. If counsel's argument is accepted there can be no finality to litigation in such cases and the rule of *res-judicata* as well as that of limitation will have to be practically abrogated. The absurdity of the conclusion it leads to is the best refutation of the argument.

The fourth contention relates to the want of knowledge on the part of Roda. As to this I think the evidence is ample to prove knowledge on the part of Roda. The local commissioner finds it and the evidence supports his conclusion. The local commissioner also holds that Kabul was adopted with ceremonies before the execution of the deed of 1894 and thus Roda must have come to know of it. The learned counsel's strictures on the evidence are insufficient to discredit the whole of it. Moreover, the treatment of Kabul must have given some inkling of the intention of Bhupa regarding him, and Bhupa's proceedings must have been watched with some interest by his reversioners, next

⁽¹⁾ 71 P. R., 1901. ⁽²⁾ 20 P. R., 1902.

⁽³⁾ 116 P. R., 1901. ⁽⁴⁾ I. L. R., XX Cal., 497.

⁽⁵⁾ 18 P. R., 1895, F. B.

of kin and friends, and the deed of 1894 which was registered must have become known. Two of its witnesses belong to the village and two are lambardars of adjacent villages not more than one or two miles off, though they are Mussalmans. Under these circumstances it must be held that sufficient publicity was given to the deed. The Divisional Judge would have held that Roda had knowledge, but that the deed was a will and the witnesses must therefore have described it to him as such. This is a mere assumption. The probabilities are exceedingly strong that Roda had knowledge of the declaration of adoption contained in it, if indeed he did not know of the fact of adoption before. Knowledge therefore may be held to be proved. There is nothing to rebut such a conclusion. I find, therefore, that Roda had knowledge of the adoption as well as of the deed, and that the present claim by his sons is accordingly beyond time.

As to the argument that the deed being a will no suit could be brought to set it aside, it is sufficient to observe that the evidence establishes an adoption prior to the deed and that the deed itself contains a declaration of adoption and a suit would have lain against the adoption so set up.

It is unnecessary in view of the above findings to go into the question of the validity of the adoption.

I accept the appeal and restore the decree of the first Court with all subsequent costs.

Appeal allowed.

No. 69.

Before Mr. Justice Reid and Mr. Justice Anderson.

ANDERSON,—(DEPENDANT),—APPELLANT,

Versus

DELHI COTTON MILLS COMPANY, LIMITED,—(PLAINTIFF),
—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 581 of 1902.

Principal and agent—Managing Agent and Company—Liability to account—Non-joinder of parties—Effect of objection as to non-joinder not taken in time—Civil Procedure Code, 1882, Section 34.

Held, that the relationship between a Company and its Managing Agent being that of principal and agent, it is the duty of the latter to render proper accounts to the former. The fact that an Agent of a Company was paid by commission or was subordinate to the control of its Directors, or that he had delivered up to them all the account books of

the Company, does not exonerate him from the liability to account. *Hurrinath Rai v. Krishna Kumar Bakshi* ⁽¹⁾ and *Lawless v. Calcutta Landing and Shipping Company, Limited* ⁽²⁾ referred to.

Held, also, that objection in respect of non-joinder of parties not raised at the earliest possible opportunity must be deemed to have been waived by the defendant.

Kalu Khan v. Sewa Ram ⁽³⁾ cited.

Miscellaneous Appeal from the order of T. P. Elles, Esquire, District Judge, Delhi, dated 2nd June 1902.

Grey, for appellant.

Shadi Lal, for respondent.

The judgment of the Court was delivered by

11th May 1903.

REID, J.—This is a suit by Directors of a Company for an account of the management of the Company's affairs during the period of the employment of the firms of W. Wilson and Co. and Messrs. Anderson, Wright and Co. as Managing Agents of the Company, and for such sum as may be found to be due on the accounts.

The sole defendant is "J. Anderson, of Delhi, of the firm of "W. Wilson, Delhi, and of Messrs. Anderson, Wright and Co., "of Delhi, *per* W. Kirkpatrick, Agent of Delhi."

On appeal from an order for the rendition of accounts it was contended that Mr. J. Anderson was not the sole surviving member of the firm of W. Wilson and Co. and an issue on that point was remanded. The finding on remand, which has not been objected to, is that Messrs. H. B. Muir and W. A. Clarke are also surviving members of the firm, which consisted of Mr. W. Wilson and the firm of Anderson, Wright and Co., which consisted of Messrs. J. Anderson, Muir and Clarke, and T. S. Anderson, deceased, and represented by Mr. J. Anderson.

Paragraph 7 of the plaint was as follows: "That defendant "as surviving partner of the firm of W. Wilson and of Messrs. "Anderson, Wright and Co., in their capacity of Managing Agents "of the plaintiff Company, are legally bound to render true and proper accounts of their management to the plaintiff, but he has "refused to do so on demand being made from him."

The allegation that the present appellant was surviving partner was not denied in the written statement, and it was not pleaded that it was necessary to implead other surviving partners.

⁽¹⁾ *I. L. R., XIV Calc., 147, P. O.*

⁽²⁾ *I. L. R., VII Calc., 627.*

⁽³⁾ *156 P. R., 1889, F. B.*

On the contrary, applications for summoning witnesses, for discovery of documents and for postponement, filed by the pleader for the appellant, were headed "Delhi Cotton Mills v. Anderson, Wright and Co.," and the appellant accepted the position of representing that firm, the survivors of W. Wilson and Co.

The plaint is badly drafted, but the intention was, in our opinion, to describe the appellant as sole surviving partner. Had the plea taken in appeal been pressed below the question could have been decided without difficulty, and, under Section 34 of the Code of Civil Procedure, the appellant must, in our opinion, be held to have waived the objection that he cannot be sued alone. *Kala Khan v. Sewa Ram* (1) is in point. In this view it is unnecessary to consider whether he could, in any case, have been sued alone. The other pleas pressed in this Court were (1) that a suit for an account did not lie, the Managing Agents being servants of the Company, paid by commission and working entirely under the supervision of the Directors, the registered office of the Company being in the office of W. Wilson and Co.; and (2) that a full account had already been rendered. It will clear the ground to deal with the second plea first. The Court below has limited the account to the period from the 31st October 1899, the end of the last working year for which the Managing Agents' accounts were passed by the Directors, to the date on which the agents relinquished the agency, apparently on or about the 17th April 1900.

For the appellant it has been pleaded that, inasmuch as all the books of the Company were made over to the Managing Agent, Kanhaia Lal, a Director, for the Directors in September 1900, no account could be rendered by the appellant on the 6th May 1901, the date of suit. We are unable to accept this plea. Rendition of accounts means something more than making over account books, and we cannot find on the record any evidence of rendition. In the Directors' report for the year terminating on the 31st October 1900 it was stated that Messrs. Anderson, Wright and Co., though requested to submit a statement of accounts, had so far failed to do so. On the first plea counsel for the appellant relied on Story's Equity Jurisprudence, Edition 13, Section 463, and Bowstead on Agency, Edition 2, page 138, for the proposition that a suit for the recovery of sums, alleged not to have been accounted for, was the appropriate remedy of the Company. In our view of the duties of the Managing Agents and of the fiduciary

(1) 156 P. R., 1889, F. B.

relation between them and the Company, this proposition is not established. The fact that they were paid by commission and were subordinate in certain matters to the Directors does not exonerate them from the liability to account, and Article 88 of Association of the Company, "The management of the Company "by the said Managing Agents shall be subject to the control of "the Directors," does not, in our opinion, mean that no fiduciary relation existed between the Agents and the Company. *Hurrinath Rai v. Krishna Kumar Bakshi* ⁽¹⁾ and *Lawless v. The Calcutta Landing and Shipping Co., Ltd.*, ⁽²⁾, are authority for a suit for an account being the appropriate remedy.

The plea that the appellant cannot render accounts, the books of the Company not being in his possession, has been met by the Court below, and we concur in that finding. As to the liability of the surviving members of the firm of W. Wilson and Co. to account for monies received by Mr. W. Wilson as representing the firm and not accounted for, there can, in our opinion, be no doubt, and no authority against such liability has been cited.

It has not been suggested that any member of the firm except Mr. W. Wilson and Mr. J. Anderson had personally anything to do with the management of Company.

The appeal fails and is dismissed, but, inasmuch as the plaint was carelessly drafted and this carelessness probably encouraged the appellant to appeal, the parties will bear their own costs of this Court.

Appeal dismissed.

No. 70.

Before Mr. Justice Reid and Mr. Justice Anderson.

HARCHAND RAI,—(DEFENDANT),—APPELLANT,

Versus

RANG LAL AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 720 of 1900.

Public Company—Suit by liquidator for money due to the Company in respect of unpaid calls on shares—Limitation—Limitation Act, 1877, Schedule II, Article 120.

Held, that the period of limitation applicable to a suit brought by a liquidator of a Public Company to recover the unpaid amount of

(¹) *I. L. R., XIV Calc.*, 147, P. C. (²) *I. L. R., VII Calc.*, 627.

calls from a shareholder is six years from the date of default under Article 123 of the Second Schedule to the Limitation Act.

The Parell Spinning and Weaving Company v. Manek Haji ⁽¹⁾ cited. *In re Duckworths* ⁽²⁾, *In re Stockens* ⁽³⁾, *Waterhouse v. Jamieson* ⁽⁴⁾, *In re Whitehouse & Co.* ⁽⁵⁾, *In re National Funds Assurance Co.* ⁽⁶⁾, *Sukho Bibi v. Ram Sukh Das* ⁽⁷⁾, *Raghubar Dial v. Madan Mohan Lal* ⁽⁸⁾, *Sorabji Jumsetji v. Ishwar Das Jugjivan Das* ⁽⁹⁾, *In re Ram Sunker Bhadoory* ⁽¹⁰⁾, *Manekji Framji v. Rustomji Naserwanji Mistry* ⁽¹¹⁾, and *Parashram Jethmal v. Rakhma* ⁽¹²⁾ referred to.

Further appeal from the order of W. A. Harris, Esquire, Divisional Judge, Delhi Division, dated 17th May 1900.

Grey, for appellant.

Shadi Lal, for respondents.

The judgment of the Court was delivered by

REID, J.—The plaintiff-respondents as liquidators of the Cotton Ginning Co., Limited, Delhi, sued the defendant-appellant on the 2nd January 1900 for money due to the Company in respect of unpaid calls on shares. 8th June 1903.

On the 10th November 1895, the appellant purchased 11 shares of Rs. 100 each, on each of which Rs. 5 had been paid on allotment. A call of Rs. 20 per share had been due since July 1895, Rs. 40 per share became due on the 1st January 1896, and Rs. 35 per share became due on the 3rd March 1896. The appellant paid nothing in respect of these calls, and on the 12th February 1897 the Directors forfeited his 11 shares under Article 26 of Association, in pursuance of notice issued, on the 28th November 1896, under Article 24 of Association, Articles 24, 25, 26, 27, 28 correspond to Articles 17, 18, 19, 20, 21 of Table A of the Indian Companies Act, VI of 1882, and Article 1 of Association provides that Table A shall not apply to the Company. Article 28 of Association runs as follows:—

“ Any member whose shares have been forfeited shall notwithstanding be liable to pay to the Company all calls, interest and expenses due in respect thereof at the time of forfeiture.”

⁽¹⁾ *I. L. R.*, X Bom., 483.

⁽²⁾ *L. R.*, II Ch., 578.

⁽³⁾ *L. R.*, III Ch., 412.

⁽⁴⁾ *L. R.*, II H. L. (Sc.) 29.

⁽⁵⁾ *L. R.*, IX Ch. D., 595.

⁽⁶⁾ *L. R.*, X Ch. D., 118.

⁽⁷⁾ *I. L. R.*, V All., 263.

⁽⁸⁾ *I. L. R.*, XXI All., 3.

⁽⁹⁾ *I. L. R.*, XX Bom., 654.

⁽¹⁰⁾ 3 Cal. L. R., 440.

⁽¹¹⁾ *I. L. R.*, XIV Bom., 269.

⁽¹²⁾ *I. L. R.*, XV Bom., 299.

The Court of first instance found that Article 112, Schedule II of the Limitation Act, applied, and dismissed the suit. The lower Appellate Court following *The Parell Spinning and Weaving Company, Limited, in liquidation v. Manek Haji* ⁽¹⁾, held that Article 120 applied, and further held that, inasmuch as limitation ran from the date of the forfeiture, when the amount due on the shares became claimable as a debt, it was immaterial whether Article 112 or Article 120 applied; the suit having been instituted within three years of the forfeiture.

Counsel for the appellant has referred to Section 61 (a) of the Companies Act, but has not alleged that the winding up of the Company commenced one year or more after the 12th February 1897. The record is silent on this point; but, inasmuch as the point was not taken below and has not been seriously taken here, we assume that the winding up commenced within a year of that date.

The question for decision may, in our opinion, be decided without considering the correctness of the second ground on which the lower Appellate Court found the suit within time.

The authorities cited are *Duckworth's case* ⁽²⁾, *Stocken's case* ⁽³⁾, *Waterhouse v. Jamieson* ⁽⁴⁾, *In re Whitehouse and Co.* ⁽⁵⁾, *In re National Funds Assurance Co.* ⁽⁶⁾, *Sukho Bili v. Ram Sukh Das* ⁽⁷⁾, *Raghular Dial v. Madan Mohan Lal* ⁽⁸⁾, *Serajji Jamsetji v. Ishwar Das Juggivan Das* ⁽⁹⁾. Our attention has also been directed to the notes to Article 112 in Stirling's Limitation Act, edition 4.

Careful consideration of these authorities leads us to the conclusion that the rule laid down by Jardine, J., in *re The Parell Spinning and Weaving Company, Limited, in liquidation* ⁽¹⁾, is correct. No subsequent judgment, in appeal or otherwise, reversing or differing from that learned Judge, who sat on the original side when he decided the case, has been referred to, and the judgment was delivered nearly seventeen years ago. The fact that the appellant had ceased to be a shareholder before liquidation, while the defendant in the *X Bombay* case was a shareholder up to the date of liquidation, does not, in our opinion, affect the question.

⁽¹⁾ I. L. R., X Bom., 483.

⁽²⁾ L. R., 11 Ch., 578.

⁽³⁾ L. R., 111 Ch., 412.

⁽⁴⁾ L. R., 11 H. L. (Sc.), 29.

⁽⁵⁾ I. L. R., X Ch., D. 595.

⁽⁶⁾ L. R., X Ch., D. 118.

⁽⁷⁾ I. L. R., V All., 263.

⁽⁸⁾ I. L. R., XVI All., 3.

⁽⁹⁾ I. L. R., XX Bom., 654.

In re Ram Sunker Bhadoory ⁽¹⁾, *Manekji Framji v. Rustomji Naserwanji Mistri* ⁽²⁾ and *Parashram Jethmal v. Rakhma* ⁽³⁾, follow the rule cited in the *Parrell Spinning Company case* ⁽⁴⁾, that statutes of limitation are to be construed strictly and are not to be extended by construction to cases not clearly included within their terms.

For these reasons we hold that the suit was not governed by Article 112, or by any article other than 120, and having been instituted within six years of the first default and of the forfeiture of the appellant's shares, was within limitation.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 71.

Before Mr. Justice Chatterji and Mr. Justice Harris.

MALIA,—(DEFENDANT),—APPELLANT,

Versus

RALLIA RAM,—(PLAINTIFF),—RESPONDENT.

APPELLATE SIDE.

Civil Appeal No. 361 of 1902.

Mortgage—Conditional sale—Regulation XVII of 1806—Suit for possession—Duty of plaintiff to prove strict compliance with conditions—Absence of proof of previous demand before issue of notice of foreclosure.

In a suit for possession after foreclosure of a mortgage by conditional sale under Regulation XVII of 1806, it appeared that there was no mention in his plaint by the plaintiff, nor any proof on the record that he had made a demand for payment before issue of the notice, but in the application for the issue of notice itself, it had been stated that several demands had been made. The defendant having taken no objection in the lower Courts, no issue was framed on the point. On the claim being decreed by the lower Courts, the defendant applied for revision under Section 70 (b) of the Punjab Courts Act, and objected to the decree on other grounds. The objection as to demand was not entered in the written application, but taken before the Judge in Chambers who permitted it to be raised.

Held, that as a demand prior to notice was essential to its validity, and required to be clearly established, the defendant was competent to rely upon it, even at that stage, but that the failure of the plaintiff to prove demand was excusable, and under the special circumstances, it would not be just to decide that the notice was invalid on that ground without giving plaintiff an opportunity to rectify his omission.

⁽¹⁾ 3 Calc. L. R., 440.

⁽²⁾ I. L. R., XIV Bom., 269.

⁽³⁾ I. L. R., XV Bom., 299.

⁽⁴⁾ I. L. R., X Bom., 483.

Mussammat Lachmi v. Tota ⁽¹⁾ and *Madho Pershad v. Gajudhar* ⁽²⁾ referred to.

Further appeal from the decree of Maulvi Inam Ali, Divisional Judge, Sialkot Division, dated 14th December 1900.

S. N. Barry, for appellant.

Ishwar Das, for respondent.

The judgment of the Court was delivered by

14th Jany. 1903.

CHATTERJI, J.—The material facts of this case are sufficiently given in the judgments of the lower Court. It is a suit for foreclosure of a mortgage by way of conditional sale executed on 19th November 1888. In the plaint there is no mention of a demand for payment having been made before the application for the issue of notice, under Regulation XVII of 1806 on the mortgagor, but it is expressly stated in the application itself that several demands had been made.

The defendant did not appear in the first Court, the proceedings in which were accordingly *ex-parte*. The Court, however, dismissed the suit, holding the notice to be defective in its language in certain particulars. The Divisional Judge reversed this decree holding the objections to the notice to be of no force, and remanded the suit for re-trial. The first Court then went into the questions of consideration and free consent to which its attention had been especially directed by the Divisional Judge, and finding in plaintiff's favour on both points, decreed the claim. On appeal the Divisional Judge maintained the finding of the lower Court, and upheld its decree.

The point taken here, on which a revision, under Section 70 (b) of the Punjab Courts Act has been admitted, is that there is no proof of the demand of payment previous to the issuing of the notice which is therefore bad. It is undoubtedly true that it is incumbent on the plaintiff to prove affirmatively by satisfactory evidence that the proceedings for the issue of notice were strictly regular and in accordance with law. See *Mussammat Lachmi v. Tota* ⁽¹⁾ and the judgment of their Lordships of the Privy Council in *Madho Pershad v. Gajudhar, &c.* ⁽²⁾. The demand prior to notice is essential to its validity, and requires to be clearly established.

It is argued that the objection never having been taken before should not now be entertained, and that as the appellant

⁽¹⁾ 16 P. R., 1888. ⁽²⁾ I. L. R., XI Cal., 111, P. C.

did not appeal from the first order of the Divisional Judge, holding the notice to be regular and legal, he could not have urged it on appeal to this Court, had an appeal lain, unless it was entered in the written memorandum of appeal, and that *a fortiori* this being a revision application and the ground not having been taken in the same, it should not be heard. But the terms of Section 591, Civil Procedure Code, on which reliance is placed, do not apply to revisions under Section 70 (b) of the Punjab Courts Act, and the ground, though not entered in the written application was taken before a Judge in Chambers and permitted to be raised. Under these circumstances the contention must be overruled. The application, however, having been admitted will be decided as an appeal, though strictly on the point alone on which it has been admitted.

The question for consideration then is, whether we should dismiss the suit, holding the notice invalid, because the preliminary demand is unproved on the record, or allow plaintiff an opportunity to produce evidence to prove the demand. The case differs from *Mussammât Lachmi v. Tota* ⁽¹⁾ as the demand is expressly mentioned in the application for issue of notice of foreclosure. The defendant, moreover, never took the objection, and the Court framed no issue as to the demand. The failure of the plaintiff to prove the demand is, therefore, in our opinion excusable, and it would not be just to decide that the notice is invalid on this ground without giving plaintiff an opportunity to rectify his pardonable omission.

We accordingly return the case to the Court of first instance to take all evidence of the parties on the issue.

Whether a demand for payment of the mortgage-money was made by plaintiff before he applied for the issue of the notice of foreclosure.

The Court will make the inquiry with all reasonable despatch, and submit its return with the fresh evidence through the Divisional Judge, who will also give his opinion.

Appeal allowed.

⁽¹⁾ 16 P. R., 1888.

No. 72.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

GOLAK NATH AND OTHERS,—(PLAINTIFFS),—

APPELLANTS,

Versus

CRADDOCK,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 661 of 1902.

Payment—Payment of debt to representative of deceased person—Discharge—Right of executors of the deceased to ignore such payment—Notice of claim—Duty of executors—Negligence, effect of.

Held, that as no one is under legal obligation to pay debts due to the estate of a deceased person to any one claiming to be entitled to the effects of the deceased, except on the production of a probate, letters of administration, certificate or some authority to collect the debts due to the estate of the deceased, therefore a payment by a debtor to the widow of his deceased creditor, who had not obtained any authority to recover the debts due to her deceased husband's estate was not a valid discharge to the debtor, and that the executors of the deceased creditor were fully entitled to ignore such a payment, and to sue for the same.

Mere neglect on the part of the executors to give notice of their claim to the debtor did not debar them from claiming the debt, although it might be a good reason for declining to give interest, damages or even costs as regards such a claim.

Purshotam Mansukh v. Ranchhod Purshotam (1) referred to.

First appeal from the decree of Lala Chuni Lal, District Judge, Lahore, dated 11th June 1902.

Ishwar Das and Roushan Lal, for appellants.

McDonald, for respondent.

The judgment of the Court was delivered by

29th May 1903.

ROBERTSON, J.—The facts of this case are very simple and not in dispute. The defendant, Mr. Craddock, rented a house from Sardar Dyal Singh at Rs. 150 a month. He paid rents to the Sardar up to his death. After the Sardar's death he made one payment towards rent of Rs. 1,000 to the widow of Sardar Dyal Singh on 19th March 1900, and obtained a receipt, signed by Samand Khan, agent of the Rani, who had carried out the repairs of the house. Mr. Craddock, whose rent has been raised to Rs. 2,000 per annum by the Sardar-Rs. 166-10-8 per mensem wrote to the Rani asking for a reduction to Rs. 145 and obtained

(1) 8 Bom. H. C. R., 152, A. C.

her verbal assent. The Rani did repairs and let water into the garden. About one year after the payment of Rs. 1,000 to the Rani, according to Mr. Craddock, notice was given by the executors to Mr. Craddock to pay the rent to them. After that notice, which was sent after the payments, though apparently not so long as a year after it, nothing was paid to the Rani, and Mr. Craddock expressed himself ready to pay the rent to whomsoever it might be due. The lower Court accordingly gave a decree for rent at Rs. 145 per mensem for the period claimed for, deducting the Rs. 1,000 paid to the Rani. From the deduction of Rs. 1,000 and from the refusal of the lower Court to allow interest or damages the plaintiffs appeal.

As regards the latter point, we are clear that, under the circumstances of the case, the lower Court was right neither to allow interest nor damages, and we dismiss that part of the appeal.

As regards the other grounds, the issue drawn by the lower Court was: "Was payment made to the Rani, if any, a payment made to the landlord?"

The lower Court points out that the Rs. 1,000 was paid before any demand was made by the plaintiffs or any intimation of their claim given by them, and that they neglected altogether to do their duty to the tenant, by effecting the necessary repairs which they left to be carried out by the Rani, so that the tenant naturally looked to her as the heir of Sardar Dyal Singh and representing him. The lower Court found, and we see no reason for differing from this finding that the payment of Rs. 1,000 was made to the Rani in good faith, in the sense that defendant believed the widow to be entitled to the money. He also says that the conduct of the plaintiffs shows that they only began to consider themselves as representatives of the deceased landlord from the date of the grant of probate to them, and the payment to the Rani was made two months before that. He further held that, though Section 12, Act V of 1881, made valid acts done by the executors before probate was actually granted, the intermediate acts of a tenant or other debtor are not rendered invalid by such a grant and added: "It may be that the party paid to may become liable to pay over to the grantees of the probate as money paid and received for them."

It is urged further, in support of the view taken by the lower Court, that in the absence of a will the Rani would clearly

be the heir, and seeing how uncommon wills are in this country, that Mr. Craddock was entitled to consider the Rani to be the heir, and that, as no notice was sent to him to tell him of any other claimant, the plaintiffs by their own act led him into the error, and are not in equity entitled to call upon him to pay the Rs. 1,000 paid to the Rani in good faith owing to their laches.

The argument on the other side is simply that the Rani, not being the heir, and not being entitled to receive the money, a discharge from her is no discharge from the parties entitled to claim. The only authority bearing upon the point before us which was quoted by the learned pleader for the appellants was the judgment in *Purshotam Mansukh v. Ranchhod Purshotam* ⁽¹⁾, decided by the Bombay High Court. In that case a payment had been made to the widow of the person to whom the defendant owed money. Subsequently a third person obtained a succession certificate and sued defendant for the money already paid to the widow. It was held by their Lordships that the defendant was entitled to plead that, at the time he made the payment, the widow was in fact the heir, but that it would not be enough merely to prove that he *bonâ fide* believed her to be such. The force of the ruling appears to be in the words: "at the time the payment was made." In that judgment a case was quoted in which letters of administration were granted to one Marshall in a case supposed to be one of intestacy. The defendant made a *bonâ fide* payment to him on account of debts due to the deceased. Subsequently a will was produced in which no executors were named, and the letters of administration to Marshall were revoked and granted with will attached to one Maguire. Maguire sued defendant, whose payment to Marshall was, however, held to be valid.

The English law and cases do not assist us much in this instance, because in England the practice of making wills, or in case of intestacy of appointing administrators is so universal that no one could expect for a moment to be protected from a claim by the real heir, on account of any payment to any supposed one. But here it is contended the case is different, and this is certainly true to a very large extent. In all ordinary cases payment might perhaps safely be made to the widow, as it was actually done. This being so, was the omission of the plaintiffs to give any notice of their claim to the defendant, an act which justified him in making payment to the ostensible heir, and

(1) 8 Bom. H. C. R., 152, A. C.

which debars them from suing for a second payment? Their right to sue the Rani for the money is a different question not before us. The learned pleader for the respondent contends that the neglect of the plaintiffs to inform him of their claim now acts as an estoppel in respondent's favour, and he quotes the words of Amir Ali on the Evidence Act, page 748, in support of this contention. "Negligence when naturally and directly tending to indicate intention will therefore have the same effect in creating the estoppel as actual intention." Here the contention is that Mr. Craddock had every right to assume, and would naturally assume, that the widow was the proper person to whom to pay the rent, the more so as she performed certain acts of a proprietor; that the executors must have been fully aware that the widow would be naturally assumed to be the heir, and that it was, therefore, their duty to give notice to the defendant not to treat the widow as the heir. They did not do so, and consequently it is urged they are now debarred from saying that Mr. Craddock ought not to have paid the money to the widow. No authorities directly in point have been quoted to us, and we have been unable to find any exactly in point ourselves.

We are unable to accept the contention put forward for the respondent. Mr. Craddock must be presumed to have been aware that he was under no legal obligation to pay the widow, or any one else, who did not produce a certificate, or probate, or letters of administration, or some authority to collect the debts due to the deceased person, as under Section 4 of Act VII of 1889 no decree can be passed against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person, except on the production by the person claiming of some sufficient authority under the section. Mr. Craddock was under no obligation to pay the widow, and demanded no authority. Probate was applied for in February 1899, and the case attracted much attention, and the case was before a Bench of this Court for many days in succession in the early part of 1900. Mr. Craddock paid the Rs. 1,000 on 19th March 1900, the judgment of this Court was signed 19th April 1900, and probate was granted on 31st May 1900.

It is hardly conceivable that defendant should not have had at least some knowledge that there were disputes regarding the succession to Sardar Dyal Singh's property, which should have put him on his guard, but he chose to pay, more than a year after probate had been applied for, to an unauthorized person,

without insisting on the production of authority to collect the debts of the deceased. Under these circumstances, we cannot hold that mere neglect on the part of the plaintiffs to give notice of their claim debars them from bringing it now, although we think that neglect is a good reason for declining to give interest, damages or even costs as regards this item.

We hold, therefore, that the payment by Mr. Craddock of Rs. 1,000 to the widow of Sardar Dyal Singh did not discharge his debt to the estate of the late Sardar Dyal Singh, and that a discharge from her is not a valid discharge of the claim. We think, however, that the plaintiffs ought to have given notice of their claim to the defendant, and on this ground we award the bare Rs. 1,000 only, rejecting the claim for interest or compensation, and we further direct that, as regards this Rs. 1,000, each party shall pay his own costs.

The appeal is so far accepted as to add Rs. 1,000 to the amount of the decree of the lower Court; each party to bear their own costs as regards this sum throughout.

Appeal allowed.

No. 73.

Before Mr. Justice Reid and Mr. Justice Anderson.

BADRI AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

UDHO AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 338 of 1900.

Custom—Alienation—Alienation of houses by non-proprietors—Mauza Siwan, Karnal District.

Found, that in mauza Siwan in the District of Karnal, non proprietors occupying house property for three generations (from a period antecedent to the record of rights prohibiting against transfer of houses was compiled) can transfer their houses without the consent of the proprietors.

Further appeal from the decree of W. A. Harris, Esquire, Divisional Judge, Delhi Division, dated 31st January 1900.

Madan Gopal, for appellants.

Sham Lal, for respondents.

The judgment of the Court was delivered by

REID, J.—The question for consideration is, whether Nabia, a non-proprietor, whose family had occupied the house in suit for at least three generations, had a right to mortgage that house

APPELLATE SIDE. {

23rd May 1903.

admittedly built on land originally the property of the proprietary body of the village or town Siwan.

Nabia was a dyer, and, as above stated, we are satisfied that his family had occupied the house in suit for at least three generations. The facts are practically on all fours with those in *Udha and Asa Ram, Appellants, v. Mara and others, Respondents*, decided by the Commissioner of Delhi, sitting on the civil side, on the 2nd January 1878. It was then held, after full and careful inquiry, that the proprietors had failed to prove that Mara, a non-proprietor, was not entitled to the materials of a house occupied by his family for three generations.

In *Ghulam, Maula and others v. Nanak and others* the Divisional Judge of Delhi held, on the 21st December 1895, that Siwan was in all probability "a village something like a town" where, in spite of the entry in the record of rights, a custom "has been established allowing alienations by non-proprietors, subject to the reversionary rights of the proprietors in the site and possibly to abandoned *malbah*."

Siwan is described in the Gazetteer of the Karnal District as a town, with a population of about 5,000. Although it has not a municipality or the right to levy duty on imports, we are unable to hold that non-proprietors are on the footing occupied by non-proprietors in villages, and we are unable to apply to Nabia, a non-proprietor, who occupied the house in suit before the record of rights was compiled, the prohibition against transfer of houses relied on by the plaintiffs-respondents.

The appeal is decreed with costs of all Courts, the decree of the Court of first instance being restored, and that of the lower Appellate Court being set aside. *Appeal allowed.*

No. 74.

Before Mr. Justice Anderson and Mr. Justice Robertson.

TARA SINGH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

MUHAMMAD,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 635 of 1902.

Limitation Act, 1877, Section 4, Explanation—Plaint insufficiently stamped—Payment of requisite court-fee after the expiry of limitation allowed for the suit—Plaint when deemed to have been presented—Date of institution of suit—Civil Procedure Code, 1882, Section 54.

A suit for pre-emption was filed within the prescribed period of limitation. Subsequently it was discovered that the plaint had been

insufficiently stamped and in accordance with the provisions of Section 54, Civil Procedure Code, the plaintiff was directed to supply the requisite court-fee within a fixed time. This order was complied with by the plaintiff at a time when the period of limitation allowed for the suit had expired. The defence contended that the suit was barred by limitation as the deficiency in court-fee payable on the plaint had not been paid up within the period of one year from the date on which the cause of action arose.

Held, that the suit was not barred. The date of the institution of the suit for purposes of limitation should be taken from the date of the presentation of the plaint and not from the date on which the requisite court-fee were subsequently put in.

Jhanda Khan v. Bahadar Ali ⁽¹⁾, *Moti Sahu v. Chhatri Das* ⁽²⁾, and *Skinner v. Orde* ⁽³⁾ cited and followed.

Jainti Prasad v. Bachu Singh ⁽⁴⁾, *Amjad Ali v. Muhammad Israili* ⁽⁵⁾, *Muhammad Ahmad v. Muhammad Siraj-ud-din* ⁽⁶⁾, *Durga Singh v. Basheskar Dayal* ⁽⁷⁾ and *Venkatramayya v. Krishnayya* ⁽⁸⁾ dissented from.

Miscellaneous further appeal from the order of Khan Abdul Ghafur Khan, Divisional Judge, Shahpur Division, dated 3rd June 1902.

Shib Das, for appellants.

S. Lal, for respondent.

The judgment of the Court was delivered by

21st April 1903.

ANDERSON, J.—A question of limitation arising out of the insufficient stamping of a plaint in a suit which should, in our opinion, for purposes of limitation, be regarded as a pre-emption suit, has been referred for decision.

The claim was for declaration of pre-emption in reversionary rights of one Lakhan, defendant, in 255 *bighas* $3\frac{1}{4}$ *kanals* in possession of Mussamrat Fateh Bibi, widow of Karm, with half share of a well, and in the seventh clause of the plaint the plaintiff expresses himself willing to pay the market price. The suit was valued at five times the revenue assessed on *khowat* land without allowing anything for extensive common land rights—Rupees 5-10-0 only—and the first Court very properly directed the stamp to be made up to Rs. 10. This not having been done within the period of one year from the time that the cause of action arose the first Court held the suit to be time-barred and dismissed it. It cited a ruling of the Madras

⁽¹⁾ 3 P. R., 1893.

⁽²⁾ I. L. R., XIX Cal., 780.

⁽³⁾ I. L. R., II All., 241, P. C.

⁽⁴⁾ I. L. R., XV All., 65, F. B.

⁽⁵⁾ I. L. R., XX All., 11, F. B.

⁽⁶⁾ I. L. R., XXIII All., 423.

⁽⁷⁾ I. L. R., XXIV All., 218.

⁽⁸⁾ I. L. R., XX Mad., 319.

High Court, apparently *Venkatramayya and others v. Krishnayya* ⁽¹⁾, and distinguished the case of *Jhanda Khan v. Bahadar Ali and others* ⁽²⁾.

The Divisional Judge reversed this order, holding the lower Court had, by its order for payment of the proper court-fees, admitted that the deficient court-fee was paid on account of the plaintiff's mistake, which order was complied with, and held the case was covered by the ruling in the case of *Jhanda Khan v. Bahadar Ali and others* ⁽²⁾. That ruling was passed on 3rd January almost co-temporaneously with the Full Bench ruling of the Allahabad High Court in the case *Jainti Prasad v. Bachu Singh* ⁽³⁾ (10th January 1893), which has since been followed in three decisions of the same High Court, viz.—

Amjad Ali v. Muhammad Israil ⁽⁴⁾, *Muhammad Ahmad v. Muhammad Siraj-ul-din* ⁽⁵⁾, and the latest ruling in *Durga Singh v. Bisheshar Dayal and others* ⁽⁶⁾.

The judgment in *Venkatramayya v. Krishnayya* ⁽¹⁾, which was pronounced on 6th August 1897, was also not before this Court when deciding the case of *Jhanda Khan v. Bahadar Ali and others* in January 1892. It approved the decision of the Allahabad High Court holding (page 321) that no retrospective validity can be given to a document which, at the time when it was first presented, was invalid.

The question to be considered is therefore whether it is the business of the Court under the circumstances arising in the present case to require the plaintiff to correct the valuation of the relief sought within a fixed period in accordance with the provisions of Section 54, Civil Procedure Code, and the fact that he was unable to do so within the period of limitation does not prevent the Court from holding his suit instituted on the date when the plaint was originally presented. The first Court held that because the plaint had been filed by a pleader there was less excuse for the wrong valuation than if the plaint had been put in by plaintiff himself, but this makes no real difference. In the ruling of 1893 it is laid down that, if the relief sought as a whole has been undervalued, the Court can and must take action under Section 54, Civil

⁽¹⁾ *I. L. R.*, XX *Mad.*, 319.

⁽²⁾ 3 *P. R.*, 1893.

⁽³⁾ *I. L. R.*, XV *All.*, 65, F. B.

⁽⁴⁾ *I. L. R.*, XX *All.*, 11, F. B.

⁽⁵⁾ *I. L. R.*, XXIII *All.*, 423.

⁽⁶⁾ *I. L. R.*, XXIV *All.*, 218.

Procedure Code, and should require the plaintiff to file the additional stamp, and that this will have to be done without allowing Section 4 of the Limitation Act to render the Court's carrying out its function a mere nullity. The reasons given on pages 36 and 37 of *Jhanda Khan v. Bahadar Ali* ⁽¹⁾ appear to us sufficiently cogent and we see no good reason to differ from the principles of that ruling and to make a reference to a Full Bench. As the matter now stands, the Allahabad High Court has decided on the view it prefers to take in such cases and holds that Section 4 of the Limitation Act prevents the Court from allowing *locus penitentie* and curing a defect in an incompletely stamped document, and the Madras High Court has approved of this doctrine.

We are not aware what view has been taken in Bombay but, at Calcutta, in the case of *Moti Sahu v. Chhatri Das* ⁽²⁾, a similar view to that taken by this Court appears to have been maintained since that judgment was promulgated, as it does not appear to have been overruled. It is the ruling of a Divisional Bench by Prinsep and Banerji, Judges. The dictum of their Lordships of the Privy Council in the case of *Skinner v. Orde* ⁽³⁾, quoted on page 38 of *Jhanda Khan v. Bahadar Ali* ⁽¹⁾, also strikes as applying by analogy to the question now under consideration. As at present advised, we think there was no sufficient reason shown in the present case for not following the ruling in *Jhanda Khan v. Bahadar Ali* and others, and that the Divisional Judge's order directing that the Court should proceed to hear the case after its order as to payment of court-fee had been complied with was the proper order to pass under the circumstances and should be upheld. We therefore reject the appeal and direct that appellants shall bear respondent's cost in this Court.

23rd April 1903.

ROBERTSON, J.—Section 48, Civil Procedure Code, *et seq.*, provide for the manner in which a suit shall be instituted. Section 54 prescribes how an insufficiently stamped plaint shall be dealt with. Is it anywhere said that a plaint is not to be considered instituted until fully stamped? I concur in dismissing the appeal.

Appeal dismissed.

⁽¹⁾ 3 P. R., 1893.

⁽²⁾ I. L. R., XIX Cal., 780.

⁽³⁾ I. L. R., II All., 241, P. C.

NOTE.—The same point was again decided in the following case :—

Before Mr. Justice Anderson.

RAM,—(PLAINTIFF),—PETITIONER,

Versus

TAJA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} REVISION SIDE.

Civil Revision No. 288 of 1902.

Petition for revision of the order of Mirza Zafar Ali, Additional District Judge, Shahpur, dated 30th December 1901.

Shadi Lal, for petitioner.

Ishwar Das, for respondents.

The judgment of the learned Judge was as follows :—

ANDERSON, J.—In this case the District Judge has declined to hear an appeal in a pre-emption suit which came before his Court, valued for purposes of jurisdiction at less than Rs. 100 (he having powers to hear such suits) and which had been previously heard and disposed of by a third class Munsif and remanded by this Court.

21st May 1903.

His ground for so declining to hear it was that he discovered that the suit should have been stamped in accordance with a calculation on an assessment of land revenue not less than 30 times 5 or 8 annas which would make the suit, for purposes of jurisdiction, beyond the powers of a third class Munsif. He was also of opinion that plaintiff could not now be allowed to make up the deficiency and that he had never laid a valid plaint before the Court at all, and for this relied on Section 582 A of the Civil Procedure Code.

The ideas of this officer as to the Court's inability to allow deficiency of court-fee to be made up after the period for limitation for suit has expired have been corrected by a recent ruling of a Bench of this Court, in Civil Appeal 635 of 1902, in which it was decided that the rulings of the Allahabad High Court in *Jainti Prasad v. Bachu Singh* (1), *Amjad Ali v. Muhammad Israil* (2), *Muhammad Ahmad v. Muhammad Siraj-ud-din* (3) and *Durga Singh v. Basheshar Dayal* (4) should not be followed, but the Calcutta rulings of *Moti Sahu v. Chitri Das* (5), and *Ilari Mohan Chackerbutti v. Naim-ud-din Muhammad* (6), and the ruling of this Court in *Jhanka Khan v. Bihadar Ali* (7).

Section 582 A refers to appeals and has no application to a case like the present. Its object is to provide for the validation of improperly stamped appeals presented within limitation.

The case is really governed by Section 11 of Act VII of 1887, to which, apparently, the District Judge, in his anxiety to propound a legal conundrum, paid no attention.

(1) *I. L. R.*, XV All., 65.

(4) *I. L. R.*, XXIV All., 218.

(2) *I. L. R.*, XX All., 11.

(5) *I. L. R.*, XIX Cal., 780.

(3) *I. L. R.*, XXIII All., 423.

(6) *I. L. R.*, XX Cal., 41.

(7) 3 P. R., 1893.

That section provides that an Appellate Court shall not entertain an objection to jurisdiction by reason of under-valuation of a suit in a Court of first instance, unless (a) the objection was taken in the Court of first instance before the hearing at which issues were first framed; or (b) the Appellate Court is satisfied, for reason to be recorded by it in writing, that the suit is under-valued and that the under-valuation has prejudicially affected the disposal of the suit on its merits.

The first condition has not been fulfilled, and, as to the second, the District Judge has merely noted that, as the proper value of the suit was Rs. 100, it was out of jurisdiction of a third class Munsif. He has not given any reason for holding that the under-valuation of suit has prejudicially affected its disposal on the merits, but thought that the plaintiff intended to deceive the Courts and to evade payment of duty. The mistake as to valuation was natural enough, and, probably, innocent enough, as, in suits of this sort, the usual tendency is to exaggerate the value so as to magnify the importance of the suit and gain greater facilities for appealing. A third class Munsif, who was a Tahsildar, was quite able to understand the case.

There is no occasion, as suggested, for this Court setting aside the proceedings of the Court of first instance as void for want of jurisdiction. These should hold good. As the proper stamp appears to be about Rs. 11-8-0 and value of suit over Rs. 100, but no objection to jurisdiction was taken in Court of first instance, the appeal may now be heard by the Divisional Court on deficiency of court-fee being made up.

The District Judge's order, except as to the finding that stamp is deficient and as to return of plaint for presentation to a proper Court, is to be taken as set aside. Under the circumstances of the case, it is proper that parties should each bear their own costs in this Court and in the District Judge's Court. Application allowed.

No. 75.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

SANATAN DHARM SABHA, HOSHIARPUR,—(PLAINTIFF),
—APPELLANT,

Versus

MUSSAMMAT SOBHI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 39 of 1900.

Charitable trust—Oral gift of immovable property creating charitable trust—Trust of immovable property—Indian Trust Act, 1882, Section 5—Locus standi of third parties to contest gift.

Held, that a gift of immovable property creating a public charitable trust does not fall within the purview of the Trust Act, 1882, and that therefore it is not essential that it should be in writing signed by the author of the trust or the trustee and registered.

APPELLATE SIDE, }

The invalidity of a trust is a matter which concerns the creator of the trust and his heirs, creditors, trustees and beneficiaries and not those who are mere debtors of the donor; the latter can only contest the donees' title, but as soon as that is established their defence as to the *locus standi* fails.

Held, also, that where a gift does not require a writing for its validity, and is upheld by the donor in Court, third parties cannot contest the donee's title.

Kalidas Mullick v. Kanhaya Lal Pundit ⁽¹⁾ cited.

Further Appeal from the decree of S. Clifford, Esquire, Divisional Judge, Hoshiarpur Division, dated 16th October 1899.

Dharm Das Suri, for appellant.

Lal Chand, for respondent.

The judgment of the Court was delivered by

CHATTERJI, J.—This is a suit on the part of the Sanatan Dharam Sabha of Hoshiarpur, a registered society under Act XXI of 1860, for possession of certain land mortgaged to one Gokal Chand, by deed dated 2nd May 1895, in the character of donees from the mortgagee under an oral gift. The mortgagor is a Jat widow, and she and her reversioners who are said to be in actual possession of the land, as well as the donor himself, were made defendants. The first and the last did not defend the suit, though they were subsequently examined as witnesses, but the other defendants took various objections to the claim, one of which was that the oral gift by the original mortgagee to the society was void. 15th June 1903.

Various issues were drawn by the first Court, which were decided by it, but there was no issue nor finding on the plea last mentioned. The Court held that the widow mortgagor had been turned out and disinherited for misconduct by her husband and could not effect the mortgage, and that the mortgage bond was void and not enforceable, though the grounds for this view are not very clearly set forth.

The plaintiffs appealed to the Divisional Court on the questions decided against them, but the respondents took the objection that the oral gift to the Sabha was void and that plaintiffs' suit was in consequence bad. The learned Judge held that the present bond was included in a gift of bonds worth Rs. 15,000, the interest of which was to be applied to *sadabart* or the charitable distribution of food to the needy; that it was a trust

⁽¹⁾ *I. L. R.*, XI Calcutta, 121, P. C.

within the meaning of Section 3, Act II of 1882; that a trust created in respect of immovable property required to be in writing and to be registered, and that the oral gift of the bonds to the Sabha was in contravention of the law and void. He accordingly dismissed the suit on this ground.

It is argued, in appeal before us, that no question of trust arose in this suit as it was not one between the donor and the donees; that the donor, when examined in Court, affirmed and upheld the gift, and that the defendants, who are outsiders, are incompetent to challenge its validity with reference to the objects to which the subject of the gift is to be devoted. It is also argued that the Indian Trusts Act has no application.

There is no doubt that the gift, in so far as it relates to the bond in dispute, comprises an interest in immoveable property. It is equally clear that the gift, as such, does not require a writing for its validity, and that, generally speaking, as it has been completed to the utmost of the donor's power by delivery of the deed to the donees and as the donor has in Court upheld it, the defendants cannot contest the donees' title. *Kalidas Mullick v. Kanhaya Lal Pundit* (1).

The only question that remains for consideration, with reference to the Divisional Judge's view, is, whether the object of the gift being considered it should be held that a trust was created thereby, which, not having been reduced to writing and registered, is avoided by Section 5 of the Trusts Act. If this section invalidates the gift as well as the trust, we apprehend the defendants can rely on the invalidity of the deed which is the plaintiffs' sole document of title.

Now Section 1 of the Indian Trusts Act expressly exempts public or private religious or charitable endowments from the operation of the Act. The word endowment is not defined in the Act, and taking, therefore, its ordinary popular sense, we think that the sum of Rs. 15,000, in which the present bond is included, forms an endowment from the proceeds of which a *sadabart* is to be maintained. There can be no doubt that the interpretation of the purpose of the gift by the Divisional Judge is correct, and that the gift is for a public charitable object. Whether the trust is void for uncertainty is a distinct question. But we see no reason to think it so, and the authorities are clear that it is not. In our opinion, therefore, the gift and trust do not fall

(1) *I. L. R.*, XI *Calc.*, 121, P. C.

within the purview of the Trusts Act, and the Divisional Judge has erroneously applied its provisions to avoid the gift. This is sufficient to dispose of the appeal.

Of course, in a case of voluntary gift or conveyance, the donor, if the trust is void, may revoke his gift or resume his property if it is in his power to do so. If he has not perfected his gift and the trust is inoperative, he cannot be compelled by the donee to complete his act. But if the donor stands by the gift, third parties cannot take exception to the title of the donee on grounds on which the donor may do so or resume his gift, as the cases already cited appear to show. The invalidity of the trust is a matter which concerns the creator of the trust and his heirs, or his creditors, or the trustees and the beneficiaries, but outsiders, like the defendants, who are mere debtors under the mortgage-deed, have nothing to do with it. They can show that the plaintiff, as donee, has no title or ownership, but if the title is established, as it has been in the present case, their defence as to the *locus standi* of the plaintiff fails. The donor supports the gift and the donees have possession of the deed gifted, and this is enough for purposes of the present case, though, perhaps, it would be prudent for the former to draw up a written gift to save future trouble.

The defence is a highly technical one, if not vexatious, and in a case like this the Court might well have put the donor to his option and made him a plaintiff if it found the objection well sustained.

As the Divisional Judge has not considered the merits, we accept the appeal, reverse his decree and return the case to him for a fresh decision with reference to the above remarks. Court fees on the petition of appeal will be refunded; other costs will abide the event.

No. 76.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

COATES,—(OBJECTOR),—PETITIONER,

REVISION SIDE, {

Versus

KASHI RAM AND ANOTHER,—(DECREE-HOLDERS),—
RESPONDENTS.

Civil Revision No. 1476 of 1902.

Execution of decree—Attachment—Objections to attachment dismissed for default—Power of Court to restore such application to the file—Remedy of objector—Procedure—Civil Procedure Code, 1882, Sections 103, 278, 623, 647—Revision in Civil cases—Chief Court's powers of revision—Practice—Punjab Courts Act, 1884, Section 70.

Held, that the procedure prescribed for original suits by the Code of Civil Procedure does not apply to execution proceedings under Chapter XIX, and accordingly the remedy provided by Section 103 of the Code is not open to an objector whose objections under Section 278 to an attachment of certain property in execution of decree owing to his absence on the date fixed for hearing have been dismissed in default.

When a person making an application within Chapter XIX fails to prosecute it, the Court must dispose of it by dismissing it in default, and in such case the objector is only entitled to make a fresh application to obtain his relief if he is not otherwise barred, but when such an application has been disposed of on the merits the Court cannot entertain another of the similar nature or can alter or set aside its order except on review under Section 623, the provisions of which do apply to such proceedings.

Thakar Prashad v. Fakir-ulla ⁽¹⁾ and *Dhonkal Singh v. Phaikar Singh* ⁽²⁾ followed.

Held, also that it is the general policy of the law and the usual practice of the Superior Courts that the latter should interfere on the revision side in the interests of justice only in those cases where there is no other remedy or the remedy is cumbrous or expensive and to refer the applicant to it would be tantamount to denying him his relief.

Omrao Mirza v. Jones ⁽³⁾ and *Farid Ahmad v. Dulari Bibi* ⁽⁴⁾ cited.

Petition for revision of the order of Mirza Zofar Ali, Sub-Judge, 1st Class, Ferozepore, dated 4th August 1902.

Browne, for petitioner.

Ishwar Das, for respondents.

⁽¹⁾ *I. L. R.*, XVII All., 106, P. C.

⁽²⁾ *I. L. R.*, XV All., 64, F. B.

⁽³⁾ *12 C. L. R.*, 148.

⁽⁴⁾ *I. L. R.*, VI All., 223.

The judgment of the Court was delivered by

CHATTERJI, J.—In this case the petitioner filed an objection 18th June 1903.
to an attachment of certain property in execution of decree by the respondents which was dismissed in default, owing to his absence on the date fixed for hearing. He applied for re-admission of his application, giving reasons for his absence on the date of dismissal. The respondent contended that such an application was not competent, as it was not provided by the procedure governing the proceedings. The Court below, the Sub-Judge of Ferozepore, accepted the contention and rejected the application on the ground that it did not lie. The present application seeks to set aside this order on the revision side, under Section 70 (a) and (b).

It is objected on the part of the respondent, that the petitioner having another remedy, *viz.*, by a regular suit, this application ought to be dismissed. It is also argued that the order of the lower Court is correct.

We may say at the outset that clause (b) of Section 70 of the Punjab Courts Act has no application; that clause deals with decrees, and the ground of interference is that a point of law or custom is involved in the case, but not points of procedure. The order under revision is not a decree under Section 244, Civil Procedure Code, but was passed in an objection case under Section 278, Civil Procedure Code, and the point for consideration is one purely of procedure, clause (b) is thus excluded.

There remains clause (a) which is a reproduction with one alteration of Section 622, Civil Procedure Code, and the rulings under the latter section are, therefore, applicable. It is the general policy of the law and the usual practice of the superior Courts that the latter should interfere on the revision side in the interests of justice only in those cases where there is no other remedy, or the remedy is so cumbrous or expensive that to refer the applicant to it is tantamount to denying him relief. *Hassan Ali Shah v. Salig Ram* (1), *Umrao Mirza v. Jones* (2), *Farid Ahmad v. Dulari Bibi* (3).

We are of opinion, after due consideration, that the respondents' objection must prevail. It is obvious that the application merely seeks to set aside an order refusing to entertain a petition seeking the re-admission of an objection under Section 278, dismissed in default. If we accept the present application, the petition

(1) 125 F. R., 1892.

(2) 12 C. L. R., 148.

(3) I. L. R., VI All., 233

for re-admission will have to be considered on the merits, and if it is granted, the merits of the original objection will have to be decided. The unsuccessful party will then have to sue to set aside the order thus passed which will be subject to the final decree passed in such suit. It would shorten proceedings if the petitioner were to bring such a suit at once, which will require a stamp of only ten rupees. *Sardar Dial Singh v. Beli Ram* (1).

The remaining steps to be taken by him in the suit will be practically identical with those he would have to take if the objection petition were restored, but the result would be much more satisfactory. It is true that no inquiry has yet been made in the objection case, but this does not affect the suit. We think, therefore, it would tend to multiplicity of proceedings if we interfered on the revision side, and that this is not a case in which we ought to so interfere.

As the point of procedure involved is one of some difficulty and uncertainty, we think it right for the guidance of the subordinate Courts to leave an expression of opinion on record on the merits of the application and the procedure to be observed in cases of this kind.

(1). We hold, following their Lordships of the Privy Council in *Thakar Prashad v. Fakir-ullah* (2), that the procedure prescribed for original suits by the Code of Civil Procedure does not apply to execution proceedings under Chapter XIX. The 121 sections comprised in that chapter mostly deal with procedure peculiar to executions, and it would have been surprising if the framer had intended to apply another procedure mostly unsuitable. That being so, the petitioner's application for re-admission of the previous application dismissed in default did not lie. The petitioner could have made a fresh application just as decree-holders whose applications are dismissed for non-appearance can apply again for execution.

(2). We also agree with the Full Bench of the Allahabad High Court in the expression of opinion contained in *Dhonkal Singh v. Phakkir Singh* (3), that where an applicant does not prosecute his application the Court has inherent power to dispose of it by dismissing it in default. It is not competent to a person making an application falling under Chapter XIX to block the work of the Court by declining or neglecting to prosecute it. This procedure is always adopted in

(1) 51 P. R., 1897, F. B. (2) I. L. R., XVII All., 106, F. C.

(3) I. L. R., XV All., 84, F. B.

applications for execution proper, and there is no reason why it should not be followed in others.

(3). Similarly, we agree with the same Full Bench in holding that when such an application has been disposed of on the merits, the Court cannot again entertain another similar one.

(4). Nor can the Court alter or set aside the order except on review. As Section 623 has a general application and is not confined to suits proper, we think its provisions may be held to apply to orders on the merits passed on applications falling within Chapter XIX.

(5). Where a party making such an application fails or neglects, or does not wish, to prosecute it, the Court ought to dismiss it in default, and the party may then make a fresh application, if so advised, if it is not otherwise barred.

With these remarks we dismiss the present application with costs.

Application dismissed.

No. 77.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

HOTI LAL,—(PLAINTIFF),—APPELLANT,

Versus

MUSSAMMAT RAM PIARI,—(DEFENDANT),—
RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 311 of 1900.

Undue influence—Pardanashin woman—Execution of deed by pardanashin in favour of a person who is in relation of active confidence—Burden of proof—Presumption of a recital in a registered deed as to receipt of consideration—Contract Act, 1872, Section 16—Evidence Act, 1872, Section 111—Case tried without proper issues being framed—Civil Procedure Code, 1882, Section 147—Suit on bond not legally enforceable—Right to revert to original consideration.

Plaintiff sued upon a registered bond purporting to have been executed by the defendant, a married *pardanashin* lady of Delhi. The defendant admitted execution, but pleaded that the bond was without consideration and fictitious for fear of her husband who was addicted to extravagance and waste. It was proved that the defendant was the daughter of plaintiff's maternal uncle, and had been brought up in plaintiff's house and married from there, and that in fact the plaintiff was the only relation she had on her father's side, that the plaintiff held a position of active confidence with reference to her, as her husband being an unbusiness-like man, she had to call in plaintiff's aid in order to save the family property from being wasted which had been gifted to her

by her husband in full ownership. The bond sued upon was executed in plaintiff's house at Hathras, and all the witnesses and persons present at the execution were his servants, defendants, or friends. There was no one to help the defendant with advice or other assistance, her husband with whom she had all along continued to live not being even present.

Held, that such circumstances, were sufficient to modify the ordinary presumption arising out of a recital in a registered bond, "that when a bond is registered and its execution is admitted by the defendant the *onus* of proof of want of consideration and of free consent not having been given would lie on the party seeking to get out of its effect," and that the *onus* of proving good faith, fair dealing, and full and free consent must be laid on the party interested in upholding the transaction, and in the absence of such proof the deed must be declared as not binding on the executant.

Held, also, that the omission to frame an issue is not fatal to the trial of a case, especially where the parties had gone to trial well knowing what the real question between them was, and had produced evidence in respect thereof.

Plaintiff's prayer for an inquiry into the accounts which formed the alleged consideration of the bond and decree thereupon refused under the circumstances.

First appeal from the decree of Lala Chuni Lal, District Judge, Delhi, dated 23rd December 1899.

Parker and Fazal Din, for appellant.

Madan Gopal, for respondent.

The facts of the case are fully stated in the judgment of the Court delivered by

25th May 1903.

CHATTERJI, J.—The material facts of this case are briefly these: The defendant, a *pardanashin* Brahmin lady, about twenty-five years of age at the time of suit, is the daughter of plaintiff's maternal uncle. She was brought up at the house of the plaintiff and married from there. The defendant's husband, Phul Chand, is a resident of Delhi and was possessed of some property, including one residential house, situated in *gali* Ghasi Ram and a garden at Sadhaura Kalan in the suburbs of Delhi. He is, however, alleged to be a spendthrift who has gone through a good deal of his substance.

On 4th October 1893 the defendant's husband sold the garden to the plaintiff for Rs. 6,000. It was recited in the deed that the money was taken for certain construction work which the seller was about to undertake, though it was admitted that the whole of the consideration had been received. From the recitals it further appears that a portion of the garden had been previously sold by Phul Chand to two persons, Panna Lal and Ram Sarup,

viz., on 21st June 1890, and that it had been re-conveyed to him by the vendees on 1st July following (pages 163—165 of the printed record).

On 22nd February 1894 Phul Chand gifted the residential house to his wife, the defendant, in full ownership, and it was provided in the deed that defendant was at liberty to make any re-constructions or repairs she pleased (pages 160—162). He also, on the same date, executed a deed of lease in favour of the donee (page 163).

On 9th October 1897 the bond sued upon was executed by the defendant and duly registered. It is for Rs. 10,000 (ten thousand), and recites that the money had been spent in constructing a house in the city of Delhi. The witnesses were Salig Ram, Khaggu Mal *Pathak*, and Gurdial, plaintiff's *gomashta*. Both the execution and registration took place at plaintiff's house at Hathras and Phul Chand apparently was not present at the time. Interest is payable under the deed at 3 per cent. per annum.

On 1st August 1899 the present suit was filed for Rs. 10,500 principal and interest on the bond.

The defendant in her defence admitted execution, but pleaded that the bond was without consideration and fictitious for fear of her husband who was addicted to extravagance and waste, and that some money had undoubtedly been advanced by the plaintiff to her, in lieu of which a garden called Ghatia had been sold to him.

The plaintiff's replication was that he paid Rs. 6,000 in cash to the defendant's husband for the garden, that the money was applied to certain purposes which he did not know, and not to building the house at Delhi, for which he had advanced all the funds from his own pocket, and that the bond was not fictitious.

The issues drawn were—

- (1). Did full consideration for the bond pass from plaintiff to defendant ?
- (2). To what relief is plaintiff entitled ?

The first Court held that plaintiff, by reason of his near relationship and of Phul Chand's wasteful character, was implicitly trusted by the defendant; that he got the garden transferred to himself in order that he might furnish funds for the re-building of the residential house at Delhi, and did not pay cash to Phul Chand, that he personally and through his

relation Khaggu Mal arranged for the building of the house and supplied the money and the materials; that there was no good proof as to what was actually spent on the house beyond what plaintiff chose to enter in his books; that the bond was obtained from defendant without her husband's knowledge and in his absence, at plaintiff's own house at Hathras, and is valueless, and that plaintiff had received at least Rs. 6,000 by the sale of the garden, if not Rs. 8,000, for which sum he subsequently sold it, and that it was not established that the defendant received the benefit of a larger sum by the building of the house. He therefore dismissed the suit.

It is complained by the appellant first of all that there should have been a separate issue as to the payment of the consideration for the sale of the garden, and that the omission has seriously prejudiced him, inasmuch as he did not, in consequence, produce all his evidence to show the full payment in cash. We shall presently advert to the evidence produced by the appellant and discuss the finding of the lower Court on this point which is challenged by appellant, but we do not think that a substantial prejudice on the ground urged has been made out. The true issue as to consideration in the case was whether any, and if so what, consideration was received by the defendant, she having wholly denied receipt of consideration. The payment of Rs. 6,000 in cash as the purchase money of the garden was asserted by plaintiff and denied by the defendant, who stated that the amount was left with plaintiff and that he furnished the funds for building the residential house out of it. The dispute thus took the form whether the consideration money for the bond, which plaintiff admitted was advanced for building the house, was advanced from plaintiff's own pocket as a loan, or out of the deposit. The issue as to the payment of the purchase money of the garden was thus subsidiary to the main one, and, though the matter might have been put distinctly in the issue framed as to consideration of the bond or in a separate one, the plaintiff cannot be said to have been in the least prejudiced by the omission. The defendant distinctly pleaded the point from the outset and plaintiff's statement was taken on it. He, therefore, fully knew what defendant's line of defence was. He himself deposed on oath and gave all the particulars about the payment of Rs. 6,000, including the names of the persons present at the time, and referred to the entries in his books regarding this sum, as to which he also examined Gurdial, his *gomashia*. From his statement it appears that the only persons

present at the payment were himself, Khaggu Mal who is dead, Mussammat Ram Piari, defendant, who denies it and Phul Chand who has not been examined, though he was present in Court throughout. As to the books, it appears from plaintiff's and Gurdial's evidence that the purchase-money of the garden was paid out of plaintiff's private funds and that, beyond a single credit and debit entry nothing about the sum can be traced in the account books of the shop. Further, plaintiff admits that he keeps no account of the money he spends out of his own custody. Thus it is absolutely clear that there are no witnesses to the payment whom he could have examined had there been a separate issue on this head that his shop books throw no light on it, and that he has got no others. All the evidence that could have been given has been given, except that Phul Chand has not been questioned, which is not due to the issue not having been framed. In *Mussammat Mitna v. Syad Fuzl Rab* ⁽¹⁾, in which no issues had been actually drawn, but the parties nevertheless knew what they respectively had to prove and had produced their evidence accordingly, their Lordships of the Privy Council held that there was no reason for interference on this ground. See also their Lordships' observations in *Soorjomonee Dayee v. Suddanand Mohapatter* ⁽²⁾. This is a much stronger case in which the Court has really committed no mistake, and we consider that a remand for a fresh inquiry on such an issue cannot be claimed as of right by the appellant and is not necessary for the ends of justice. It would merely lead to the production of false evidence. The issue should also have expressly raised the question whether defendant gave her free consent to the bond which defendant denied, but we shall advert to this matter later on in the judgment.

At this place we might conveniently discuss the finding of the lower Court as to the payment of the consideration for the sale of the garden. We are of opinion, for the reasons given below, that the plaintiff has failed to prove that he paid cash, and that the money was in all probability kept as a deposit with him to be drawn upon for re-building the residential house.

In the first place there is no proof of it except the plaintiff's own statement, which is not of much value, and the recital in the deed and the admission of Phul Chand before the Sub-Registrar. Phul Chand has not been examined as a witness in the case or as mukhtar of defendant as to the facts of the

⁽¹⁾ 13 M. I. A., 573.

⁽²⁾ 12 B. L. R., 304, P. C.

dealings between the parties, though he and not defendant must have been the person who received most of the money alleged to have been lent by the plaintiff. There is a brief statement of his in the vernacular on 6th October 1899 (see page 3 of the printed record) which has no counterpart in the English record. It is difficult to say whether Phul Chand refers in it to the accounts or the letters, the point being hotly disputed by the parties. We incline, on the whole, to the view that his statement refers to the correspondence and not to the accounts, but even on the latter view it is too brief to be of any value. The entries in plaintiff's book are not only unsatisfactory, as proof of payment, but practically indicate that no actual payment was made. The item was not advanced from the shop from which the small sums which go to make up the consideration of the bond were advanced, but were paid out of his private funds. It is significant that plaintiff has no accounts of his private funds. The sum of Rs. 6,000 was credited to the plaintiff's name on Assoj Sudi 5th, 1950, and withdrawn the same day with Rs. 39 on account of expenses. The credit came from plaintiff's private funds and had to be shown in the books in order to allow of the withdrawal of such a sum for payment to Phul Chand on account of purchase money. Had the money been taken out of the ordinary balance of the shop there might have been some ground for maintaining that the payment was actually made. This is not the case, but it is brought in from the plaintiff's private purse as to which there is no account and all further inquiry is thus barred. This is precisely the form a fictitious entry would take. There is also no cogent reason on the record why plaintiff should have a private fund, he being the sole owner of his shop-business, nor why, if he has one, it should not have an account showing its real state with reference to the debits and credits.

Further, the money is shown in the book entry already referred to to be payable at the time of registration. Plaintiff, however, says he paid it privately to Phul Chand just before registration, without, apparently, taking a receipt from him for none is produced nor stated to be existing even in the argument before us. Considering that he was a near relation and was actively advising Phul Chand and the defendant as to dealing with their property plaintiff might easily have anticipated an objection of the present nature, *viz.*, that the deed was executed without consideration and taken

steps to secure unimpeachable evidence as to the payment. As the money was to be paid in lump and had not been already received in small sums, there is no reason why it was not paid before the registering officer. Plaintiff is a shrewd man of business as is shown by his dealings and accounts and by the fact that he has carefully kept the correspondence with the defendant her husband since 1892; so he was not likely to lose an opportunity to make the *boni fide* nature of his purchase and the full payment of the purchase money beyond question, and could not have paid Phul Chand privately under these circumstances, as a short time later the payment could be made before the Sub-Registrar. It also appears that plaintiff did not get authorization from Phul Chand to take the deed from the Registration Office, but allowed it to remain with him, for a post-card of 28th October 1893, printed at page 37, shows that Phul Chand had taken it out of the Registration Office. This agrees with the theory that the purchase money had not been paid for though there might be trust between him and the plaintiff owing to relationship; such a want of caution would not be in keeping with plaintiff's shrewd business-like instincts. Moreover, the tone and language of some of the letters which passed between plaintiff on one side, and Phul Chand and his wife on the other, seem to indicate that the latter were drawing on their own funds in plaintiff's hands rather than borrowing from him; see letters at pages 29, 30, 24, 89, 104. Lastly, the deed of sale itself recites that the sale was effected for the purpose of construction, and it is much more likely that in such a case the money would be left in the hands of the plaintiff and not given to a careless spendthrift like Phul Chand. These considerations far outweigh the presumption deducible from Phul Chand's admission of receipt in the deed of sale.

We hold, therefore, agreeing with the lower Court that the consideration money of the sale did not pass to the seller Phul Chand, but remained with plaintiff for the purpose of being laid out in re-building the residential house.

We come now to the question of the binding nature of the bond sued upon. It is registered and its execution is admitted by the defendant. Ordinarily, therefore, the *onus* of proof of want of consideration and of free consent not having been given, would lie on her. But there are special circumstances which modify the operation of the above rule. The defendant is a

young lady who does not come out in public, and is therefore a *pardanashin*; she knows Nagri, but there is no satisfactory evidence as to the extent of her education. The plaintiff was a very near relation of hers, in fact the only one she had on her father's side, and she had been brought up in plaintiff's house and married from there. The plaintiff held a position of active confidence with reference to her, as her husband being of an unsteady character, she had to exert herself, and to call in plaintiff's aid, in order to save the family property from waste. She leaned entirely on him and trusted him to the fullest extent. He had, therefore, every ground for possessing a commanding influence over her. Add to this the bond was executed at Hathras in plaintiff's house, and all the witnesses and persons present at the execution were his servants, dependents or friends. There was no one to help the defendant with advice or other assistance and her husband, with whom she has all along continued to live, was not present. The plaintiff thus was in a position to completely dominate her will and she was powerless to resist him. Under these circumstances the strictest proof of good faith and fair dealing is necessary before defendant's free consent can be predicated. This is wholly wanting in our opinion, and this is the view of the Court below as well. The defendant says she understood from plaintiff that the bond was for Rs. 5,000, and that plaintiff told her that it was being executed for form's sake to protect her property from the extravagance of her husband, and that he had no intention whatever of enforcing it. She also says that she was forbidden to mention the subject to her husband. Her statements are, of course, interested and must be received with caution, but on the whole they accord more with probability than plaintiff's evidence. Plaintiff's witnesses try to show that defendant understood the accounts, but we consider their evidence worthless. There is no independent or trustworthy person to depose to the fact, and we do not believe that the defendant had an account book by her which she compared with plaintiff's books. She was not questioned about this book, and no attempt was made to compel its production. That Phul Chand was not informed of the execution of the bond is probably true, as the very act of the plaintiff in getting it executed and registered at Hathras, instead of Delhi, and not asking Phul Chand to be present, seems to support defendant's statement. In the correspondence there is no reference to the bond. The absence of the husband has a sinister significance. He appears not to have resisted plaintiff's proposals before and gifted the house to defend-

ant, at his instance, without objection. The building of the house is said to have been done by Phul Chand and most of the money remitted to him. He, therefore, knew all about the account if any one on defendant's side did, and it is difficult to see why plaintiff chose to take a bond from defendant alone for the money and to get it executed in this fashion. Did he anticipate resistance from Phul Chand and awkward references to the consideration money for the sale of the garden? At any rate plaintiff was bound to explain the very peculiar nature of his act and the absence of the husband at the execution of the bond, and he has not attempted to do so. The principles laid down by the Courts in this country and their Lordships of the Privy Council as regards contracts made with *pardanashin* ladies appear to us to be applicable to this case. So also the provisions of Sections 16 (2) and (3) of the Contract Act and Section 111 of the Evidence Act. There is no evidence to show that Mussammatt Ram Piari understood and realized that in making the bond that she was undertaking a personal liability for the sum of Rs. 10,000, with the consequence that the residential house at Delhi which she had obtained as a gift from her husband as a protection against his improvident acts, was liable to be sold for the sum secured by the bond, that is to say, for the alleged cost of re-building it. We assume it to be beyond question that she possessed sufficient education and intelligence to understand the language of the bond if it had been honestly explained to her. But there is no reliable evidence that this was done. The probabilities are exceedingly strong that she would not have consented to any arrangement which would have rendered the gift of her husband nugatory and placed the house she obtained in this way at the absolute disposal of her cousin, and also that she would not have agreed to any scheme of re-construction, the cost of which would have materially exceeded the sum that was available for the purpose. There is no trace of the sum of Rs. 6,000 in the account on which the bond is based, and on plaintiff's statement of the case there could be none, but as we have found, in concurrence with the lower Court, that plaintiff had the money in deposit with him, we must also hold that in getting Mussammatt Ram Piari to give him a bond on an account in which she had not received credit for it plaintiff grossly overreached his cousin and betrayed the trust she reposed in him. This fact alone is sufficient to vitiate the bond and to show that defendant's free consent was not given to it. It is unnecessary to enlarge more on this point. The case is to some extent analogous to that

of *Sham Saundar Lal v. Achhan Kunwar* ⁽¹⁾, decided by their Lordships of the Privy Council. Our finding is that defendant's consent was not freely given to the bond, and that the bond is not binding on her.

We have used the word *pardanashin* with respect to the defendant in our judgment, though it does not appear in the judgment of the lower Court, because, having regard to the caste and station in life of the parties and the fact that the defendant was examined by commission, there can be no doubt that she does not appear in public. Respondent's counsel claimed that the rules in respect of such women are applicable to her and this was not seriously disputed by appellant's counsel. As already stated the lower Court did not frame an issue which was sufficiently comprehensive in language, but it was well known to plaintiff what he had to prove and he has adduced all the proof available to him as to correctness of his accounts and to their having been explained to the defendant and compared by her with the entries in her own book. The lower Court makes use of most of the arguments usually applied to such women, and finds that the deed was void, because defendant was entirely in plaintiff's hands and was his helpless dupe. No objection was taken in the argument to this mode of treatment of the case, and it was obvious from the facts that it could be properly decided only in that way. We hold accordingly, on the authority already cited, that the defect in the issue framed in the lower Court in this respect also has occasioned no prejudice and that the record is sufficient for the proper disposal of the question of free consent.

Appellant's counsel asks us, if we are unable to accept the bond as it stands, to give him an opportunity of proving his case on the accounts which, he says, have not been gone into by an expert. We have already over ruled his prayer in respect of a further inquiry into the question whether Rs. 6,000 on account of the purchase money of the garden was paid in cash. As regards his present prayer, we have, after taking time to consider our judgment, come to the conclusion that it should not be allowed. The suit is not on the accounts which were with Phul Chand and not with the defendant, though she doubtless benefited by the expenditure on the re-building of the residential house. But her liability rests merely on the bond which was taken as a sort of collateral security for the dealings on the accounts, for the bond does not appear therein, nor are they closed from its date. If the

(1) *I. L. R.*, XXI All., 71.

bond is valueless as a document creating liability the case against the defendant fails altogether. Even if we assume that there was originally an implied understanding that defendant would be liable on the accounts plaintiff could not proceed against her on that basis without a substantial amendment of the plaint. No leave to amend was applied for in the lower Court or was granted by it, and we do not think, under the circumstances, we should grant it now. Plaintiff has not acted above board, and he has attempted to over-reach defendant. He did not give her credit for Rs. 6,000 in his hands, and it is even a question whether, under all the circumstances, he should not be held accountable to defendant and her husband for the profit of Rs. 2,000 he made by the sale of the garden. However this may be, there is no equitable reason on which he can ask to be allowed to change his ground of suit. It is not even a case in which Mussammat Ram Piary is seeking to set aside her bond. She is merely a defendant, and the suit on the bond has failed. Plaintiff must, we think, be relegated to such remedies, if any, that he may have on the accounts in a separate suit.

The appeal is dismissed with costs.

Appeal dismissed.

No. 78.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

CHAND MAL AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

GANGA RAM AND ANOTHER,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 17 of 1900.

Partnership—Dissolution of partnership—Liability of retired partner for debts contracted after dissolution—Contract Act, 1872, Sections 245, 264.

Held, that when it is sought to charge a party with liability as a partner many years after the dissolution of the partnership by a person who has had no dealings with the original firm prior to its dissolution, and was not even aware that the party sought to be charged was a partner therein, and where notices of the dissolution were given to the *artis* of the firm, and there was nothing to show any attempt at concealment of the change in the constitution of the firm, the mere fact that the continuing

partner was allowed to carry on business in the old firm's name, which did not disclose the identity of the retired partner or the maintenance of a joint responsibility in a specific contract, would not render the retired partner liable to such person for debts contracted by the firm long after his retirement therefrom.

Section 264 of the Contract Act does not cover the case of a person dealing with a firm for the first time after a change from its original constitution, so as to make a partner who had already retired liable.

Chundee Charn Dutt v. Eduljee Cowasjee Bijnee ⁽¹⁾, *Mohori Bibee v. Dharmodas Ghose* ⁽²⁾, *Rampal Singh v. Balbhaddar Singh* ⁽³⁾, *Dickinson v. Valpy* ⁽⁴⁾, *In re Fraser, Central Bank of London, ex-parte* ⁽⁵⁾, *Newsome v. Coles* ⁽⁶⁾, *Scarf v. Jardine* ⁽⁷⁾, *Carter v. Whalley* ⁽⁸⁾, *Ramasami v. Kadar Bibi* ⁽⁹⁾, and *Bullen v. Sharp* ⁽¹⁰⁾ referred to.

First appeal from the decree of S. Clifford, Esquire, Divisional Judge, Hoshiarpur Division, dated 11th December 1899.

Grey and Gour, for appellants.

Ishwar Das, for respondents.

The facts of the case are fully stated in the judgment of the Court delivered by

15th May 1903.

ROBERTSON, J.—The facts of this case may be first very briefly set out.

The defendant is one Dhanrup Mal, of the firm of Rughnath Das Hamir Mal, of Hoshiarpur, who had charge of the Hoshiarpur Treasury. The plaintiff in this suit and the plaintiffs in the other connected cases are persons who have had dealings with the firm at Hoshiarpur, by way of deposit and withdrawal and the like.

At the opening of the hearing, we were requested by both sides to send for certain records of the Hoshiarpur Treasury from the Deputy Commissioner's Office, and we have done so. It appears that one Lala Gulab Chand accompanied the British forces in the campaign of 1846, and as a reward, was given charge of the treasuries of Jullundur, Hoshiarpur and Kangra, and afterwards Peshawar also. Gulab Chand not being very wealthy, he called in the aid of a relative, Hamir Mal of Ajmere, who was said to be very wealthy and who joined with him getting a three-fourth share, Gulab Chand only retaining a one-fourth share of the business. Gulab Chand died in 1852. Hamir Mal's firm took over the

⁽¹⁾ *I. L. R.*, VIII *Calc.*, 678.

⁽²⁾ 7 *Calc.*, W. N., 441.

⁽³⁾ *I. L. R.*, XXV *Alu.*, 1.

⁽⁴⁾ *L. R.*, X B. & C., 140.

⁽⁵⁾ *L. R.*, 2 Q. B. (1892), 633.

⁽⁶⁾ 12 *R. R.*, 756.

⁽⁷⁾ *L. R.*, 7 App. Cas., 349.

⁽⁸⁾ *L. R.*, 1 B. & Ad., 11.

⁽⁹⁾ *I. L. R.*, IX *Mad.*, 492.

⁽¹⁰⁾ *L. R.*, 1 C. P., 125.

business, paying compensation to Gulab Chand's minor son. Hamir Mal, who appears to have been the sole owner of "Hamir Mal Rughnath Das" at that time, died in 1855, leaving three sons—(1) Dhiraj Mal, (2) Chandan Mal, (3) Chand Mal. Dhiraj Mal has died leaving two sons, Kanak Mal and Dhanrup Mal, and Chandan Mal died without issue, after adopting Dhanrup Mal his nephew. The proprietors of the firm were thus Chand Mal, Hamir Mal's youngest son, and his two nephews, Dhanrup Mal and Kanak Mal. According to a statement on the file recorded by Gulab Chand's son, Sair Mal, these three were at variance, but in 1877 came to an amicable agreement for the dissolution of the partnership, and the partnership was in fact dissolved at the end of 1877. Dhanrup Mal then wrote to the Deputy Commissioner of Hoshiarpur, stating that the firm had been dissolved, and asking that the responsibilities and charges of the various treasuries might be separated off in the same manner as the banking business had been separated off. The Deputy Commissioner wrote an endorsement on this saying that responsibility must remain joint, or an application be made to resign the office.

Chand Mal and Kanak Mal petitioned the Commissioner of Jullundur to the same effect, stating that the business had been separated, but that the responsibility as regards the treasuries would remain joint until sanction was given to separation. The Commissioner on this passed an order, of which a copy was sent to the Deputy Commissioner of Hoshiarpur, with a copy of Chand Mal and Kanak Mal's letter to him, in which he said "you will see that there is no division of interests or responsibilities permitted. Only one treasurer for the Division will be recognised." An agreement was then written and executed, as between the parties, on 24th April 1878, in which they agreed to be jointly responsible to the Government, but separately responsible, as among themselves (see page 170 of paper-book), and a further arrangement in the same spirit was entered into on 8th July 1880, page 172.

Subsequently, it appears from the record that in many registered deeds Dhanrup Mal represented himself to be the proprietor of "Rughnath Das Hamir Mal," and this also occurred in cases which went into Court, in which the question of who was proprietor of Rughnath Das Hamir Mal was brought under discussion, and it was clearly stated that Dhanrup Mal only was the proprietor. In one case *Rughnath Das Hamir Mal v. Hira Singh and others*, decided on 20th May 1885, the pleader for

Dhanrup Mal at one hearing gave the names of Chand Mal, Kanak Mal and Dhanrup Mal as owners. This was deliberately corrected at the next hearing, and Dhanrup Mal alone proceeded with the suit.

At the time of the dissolution it is quite clear that notice was sent to all the agents of the firm, and Chand Mal states also to the commission-brokers or *arthias*, and the documents given at page 246 of the paper-book seem to show that this was certainly done in some cases. The evidence of both sides seems to show that when a change takes place in the constitution of a firm the custom is merely to send notice to agents and *arthias*, and this appears to have been done. It was also stated to be usual, but not invariable, to change the name of the firm. In this case it is to be noted that the name of the firms at Hoshiarpur, Kangra and Jullundur were not altered, but remained as "Rughnath Das Hamir Mal" as before, but at Ajmere each of the partners of the old firm started a new firm each with a new name. It is also to be noted that none of the plaintiffs had any dealings with the firm before this change in its constitution.

Upon these facts the lower Court has found, as a fact, which has not been disputed before us, that there was in fact a dissolution of partnership in 1877 between Dhanrup Mal, Kanak Mal and Chand Mal, but that the responsibility *qua* the treasuries remained joint, and that the name of the firm in Hoshiarpur was unchanged. No specific public notice of the change was given, and the lower Court has held that, seeing that this was the case and that the partners remained joint regarding the treasury: "There is no doubt that the treasurers after 1877, in the words of Section 245 of the Contract Act, by their conduct, led the public to believe that the Hoshiarpur shop was still the treasurer's shop, and as admittedly Chand Mal and Kanak Mal were, with Dhanrup Mal, the Government Treasurers at Hoshiarpur, I think that the plaintiffs are equitably entitled to look to all three for the re-payment of their money."

Against this decision the defendants Chand Mal and Kanak Mal appeal. Dhanrup Mal, who was the partner to whose lot the business at Hoshiarpur fell, wishes to make the others responsible with him, and this, of course, has increased the difficulties of the other defendants.

The decision of the case will mainly turn upon the effect of Section 245 of the Contract Act upon the facts disclosed; we

therefore prefer to discuss another argument put forward by the learned pleader for the respondents first :

The lower Court has not based its judgment upon the applicability of Section 264 of the Contract Act, but of Section 245. Mr. Ishwar Das, however, urged upon us that the case was governed by Section 264, and that, in view of that section, the appellants are clearly liable. That section runs thus—"Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution." That section has been discussed in *Chundee Charn Dutt v. Eduljee Cawasjee Bijnee* ⁽¹⁾, and their Lordships considered that the section was not exhaustive. It is, however, pointed out by their Lordships of the Privy Council in a very recent ruling in *Mohori Bibee v. Dharmodas Ghose* ⁽²⁾, that the Contract Act is as far as it goes "exhaustive and imperative," and it must be in the spirit of this ruling that we approach the question. This being so, it would appear on a close construction of Section 264, which has never been looked upon by the Courts as a very satisfactory section, that persons who have dealings with a firm will not be affected by any (subsequent) dissolution of which no public notice is given, unless they have notice of such dissolution themselves. It was argued by Mr. Gour for the appellants, with much force, that a person dealing with a firm, after a certain partner has retired from it, is only dealing with the firm as it then stands, *i.e.*, without the retired partner, and that, though the retired partner might be liable under principles governing the law of agency and estoppel, the "firm" could not be held to be the present *plus* the retired partner and that the word "firm" in Section 264 could not reasonably be held to have such meaning. The section is one which is not easy of interpretation, but it cannot, in our opinion, be held to cover the case of a person dealing with a firm for the first time after a change from its original constitution, so as to make the partner who had already retired liable. Such a person has had no dealings with the "firm" originally constituted at all, and cannot be said to be a person having dealings with a firm who will not be affected by dissolution of which no public notice has been given, unless they themselves had notice of such dissolution. But it is contended further for the appellant that, even if Section 264 be held to apply to the case of persons dealing first with the new firm after the change in its constitution,

⁽¹⁾ *I. L. R.*, VIII Cal., 678.

⁽²⁾ 7 *C. W. N.*, 441.

still his clients could not be held liable, as the plaintiffs certainly had notice within the meaning of the Act. Notice is defined in Section 3 of the Transfer of Property Act and Section 3 of the Trusts Act, and their Lordships of the Privy Council in *Rampal Singh v. Balbhaddar Singh* ⁽¹⁾ at page 17 have said, in reference to the definition in the former, that the principles are to be applied even in cases to which the Act is not directly applicable. Under Section 3 of the Transfer of Property Act a person is said "to have 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it" Here it is contended that it is clear from the whole facts of the case that the plaintiffs must have known that Dhanrup Mal was sole proprietor of the firm in Hoshiarpur and that, even if they deny this knowledge, they cannot possibly deny that they could have obtained that knowledge by simply asking this question. It is urged that if plaintiffs came to Dhanrup Mal's house of business and deposited money without any enquiry of any kind, there being clearly no attempt at concealment, they did so at their own risk and cannot say afterwards that they had no "notice" of the dissolution of a firm which had once existed, but which had been broken up many years before. It is remarked in *Story on Partnership*, page 276 (7th edition), that "Every new creditor or new customer is bound to inquire 'who are the persons really interested at the time in the firm if 'he would be safe in his credit and dealings with them.'"

The whole paragraph epitomises the principles governing such cases so well that we give it here *extenso* :—

"In the next place, where an ostensible or known partner "retires from the firm, he will still remain liable for all the debts "and contracts of the firm, as to all persons who have previously "dealt with the firm, and have no notice of his retirement. This "is a just result of the principle that where one of two innocent "persons must suffer from giving a credit, he who has misled the "confidence of the other, and has been the cause of the credit, "either by his representation, or his negligence, or his fraud, "ought to suffer instead of the other. And where a person notoriously holds himself out as a partner, all the world who deal "with the firm are presumed to deal with it upon his credit, as "well as upon that of the other members of the firm; and his "omission to give them notice of his retirement is equivalent to

(¹) *I. L. R.*, XXV All., 1.

“a continual representation that he still remains a member of the firm, and liable therefor. But as to persons who have had no previous dealings with the firm, and no knowledge who are or have been partners therein, a different rule may prevail. In such cases, unless the ostensible partner who has retired suffers his name still to appear as one of the firm, so as to mislead the public (as by its being stated, and still remaining in the firm's name), he will not be liable to mere strangers, who have no knowledge of the persons who compose the firm, for the future debts and liabilities of the firm, notwithstanding his omission to give public notice of his retirement, for it cannot truly be said in such cases that any credit is given to the retiring partner by such strangers. Every new creditor or new customer is bound to inquire who are the parties really interested at the time in the firm, if he would be safe in his credit and dealings with them. *Unus-quis-que debet esse quavis conditionis ejus, cum quo contrahit.*”

It is quite clear that the plaintiffs made no sort of enquiry, and there is nothing whatever on the record to show that they ever knew that Chand Mal or Kanak Mal had ever been partners in the firm of “Rughnath Das Hamir Mall.” We cannot accept Mr. Ishwar Das’ contention that the natural inference that the heirs of Rughnath Das and Hamir Mal would all be partners in the firm, without any knowledge of who they were, or how many they were, or if there were in fact more than one, can be held to take the place of that knowledge of his existence which would take a partner out of the category of “dormant” and bring him into the category of “ostensible” *qua* the plaintiff. The ease with which the necessary information could have been obtained and the entire absence of any inquiry would appear to constitute notice under Section 264 in a case like the present. We cannot, therefore, hold that, even if Section 264 be held to apply to persons who deal with a firm only after the retirement of certain partners as regards those partners, the plaintiffs can make good their claim against the appellants under that section. And in this connection we should further point out, that if the contention of the respondents were to be accepted, a partner who had retired fifty years or more before the transaction with the firm to which he had once belonged in respect to which it was sought to bind him, would still be bound. The cases relied on in the English reports are all cases in which a customer sought to fix responsibility

on a partner who had only very recently retired. Here it appears that, in five out of the seven cases under appeal, the claimants had had no dealings with the firm for twenty years or so after the partners, whom it is desired to hold responsible, had left it. The cases quoted from the English reports by the respondents' counsel deal with a very different state of affairs.

The English law on the subject, as now embodied in the Partnership Act of 1890, is not applicable in its entirety to this country. Section 36 prescribes specifically for the manner in which notice can be given so as to relieve a retiring partner from the liability laid upon him by the first clause of the section, which runs "When a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change." The second clause recites that an advertisement in a particular Gazette shall constitute notice. Notice may be proved otherwise as pointed out by Lindley, page 223, edition V:—"If notice in point of fact can be established, it matters not by what means, for it has never been held that any particular formality must be observed," but the omission to give this notice mentioned in this section would naturally be construed against the retiring partner who had neglected so obvious a precaution. In this country there is no such simple and concrete method of giving notice provided by law, and the question, therefore, as to whether the plaintiffs in these cases are to be held to have had notice or not, must be looked at somewhat differently. Cases decided after the passing of the Partnership Act in England, under the terms of that Act, therefore, are not altogether in point.

We now proceed to consider the grounds on which the learned Divisional Judge has founded his decision.

Section 245 of the Contract Act runs as follows: "A person who has, by words spoken or written, or by his conduct led another to believe that he is a partner in a particular firm is responsible to him as a partner in such firm." This section is part of the law of estoppel, as applied to partnership, and the lower Court has held that Chand Mal and Kanak Mal have rendered themselves liable to plaintiffs by their conduct. Section 245 is in accordance with the English law as laid down by Lord Wensleydale in *Dickinson v. Walpy* ⁽¹⁾. "If it could be proved that defendant had held himself out to be a partner,

(¹) *L. R.*, 10 *B. and C.*, 140.

“not to the world, for that is a loose expression, but to the plaintiff, under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant upon the strength of his being such partner.” (Lindley on Partnership, page 67, VI edition).

Here it is clearly laid down that the plaintiff must satisfy a jury that defendant held himself out to be, and plaintiff believed him to be, a partner.

The conduct which is held to estop Chand Mal and Kanak Mal from saying they are not partners now, is understood to lie in the facts that the name of the firm was not changed, and that the three partners continued to hold the treasuries of the Jullundur Division, under the express orders of the Commissioner, jointly. It is suggested that the name was not changed because each firm would then get extra credit on the supposition that it was connected with the others, and so that the firm at Jullundur belonging to Chand Mal was “holding out” the suggestion of the partnership to customers in Hoshiarpur to induce them to trust the Hoshiarpur firm and *vice versa*.

The explanation given by defendants for maintaining the old name was, respect for their predecessors Rughnath Das and Hamir Mal, and this is plausible. It may be, however, that they thought any change might be injurious to their credit. But does this maintenance of the old name amount to holding out on the part of such partners in each particular case as had in fact left the firm? In *In re Fraser, ex-parte Central Bank of London* (1), it was remarked, “Does the fact that John Fraser permitted his brother to carry on the business under the old firm’s name amount to a representation by him to the bank that he, John Fraser, was a partner in the firm. I think that *Newsome v. Coles* (2) shows that it does not.” No doubt, in that case notice had been given to bankers and the principal creditors, but the words are applicable to this case also.

In the case of *Newsome v. Coles and others* (2), in which case also notice had no doubt been fairly widely given, it was remarked by Lord Ellenborough “The plaintiff might not know of the dissolution, but he had the means of knowing and the retired partner would not remain liable for his ignorance.”

(1) *L. R.*, 2 *Q. B.* (1892) 633; 67 *L. T.*, 401.

(2) *L. R.*, 2 *Camp.* 617; 12 *R. R.*, 756.

Further it is remarked on the authority of *Scarfe v. Jardine* ⁽¹⁾, and other leading cases, in Lindley on Partnership, page 71, edition VI—"If the firm's name does not disclose the fact that the retiring partner is a member of the firm, the continued use of that name, after his retirement, will not, as a matter of fact, represent him as being a member of the firm except to persons who knew of his connection with it"

It appears to us clear that plaintiffs could, with the greatest ease, have ascertained the true facts and that the mere continuance of the old name does not constitute such an act on the part of the partners, who had in fact left the firm, as would estop them from pleading that they did not in fact belong to it. It is a factor in the case to be considered with other matters, but not by itself conclusive against the defendants, more particularly as there is nothing in the name itself to suggest that the defendants were partners, as it does not disclose their names in the title.

It is further to be noted that there is no proof whatever, and no serious allegation, that any of the plaintiffs ever knew definitely that either Chand Mal or Kanak Mal had ever been partners in the firm of Rughnath Das, Hamir Mal at Hoshiarpur. No doubt, while they were partners in the firm, they were not in one sense dormant partners, but as the plaintiffs had never been aware of their existence as partners, they were *qua* the plaintiffs in the position of dormant partners, and the retirement of a partner, whose participation in the firm has never been known to a customer, cannot affect such customer either by substantive law or the doctrine of estoppel. Lindley on Partnership, VI edition, page 70, quoting from *Carter v. Whalley* ⁽²⁾, says, "No notice of retirement is necessary in order to prevent a partner, who is not known to the person dealing with the firm to have been a partner, from becoming liable for debts contracted after his retirement," and a similar view is enunciated in *Ramasami v. Kadar Bibi* ⁽³⁾ by the Madras High Court. It is clear that for any representation to act as an estoppel it must be plain, not doubtful, or a matter of questionable inference, for certainty is essential to all estoppels—Amir Ali on Evidence, page 864, Caspary on Estoppel, page 246-47. Has this condition been fulfilled? We have seen that it has not been so by the mere retention of the old name and we cannot hold that the joint liability of the three firms for the treasuries of the Jullundur Division

⁽¹⁾ L. R., 7 App., Cas., 349. ⁽²⁾ L. R., 1 B. and Ad., 11.
⁽³⁾ I. L. R., IX Mad., 492.

under the direct orders of the Commissioner can be held to be an act of the parties by which they intended that the plaintiffs should be induced to believe all three to be parties in the private business and so to give credit to it. An agreement to indemnify of course does not constitute a partnership, and indeed it was never contended that the agreement regarding the treasurer did *in fact* constitute a partnership. (*Bullen v. Sharp* ⁽¹⁾).

To sum up, it is quite clear to us, as found by the lower Court, that the firm of Rughnath Das, Hamir Mal at Hoshiarpur was dissolved in 1877, and that from that time onwards Dhanrup Mal was the sole owner of the firm. We find that notice was sent to the various branches and certain *arthias* of the firm. We find Dhanrup Mal in deeds and suits and various ways, from time to time, asserting his sole proprietorship. We find that none of the plaintiffs ever dealt with the firm prior to its dissolution, or even knew in fact that either Kanak Mal or Chand Mal had been partners in it. We find that plaintiffs made no sort of enquiry, although they could have without the slightest difficulty ascertained exactly who were the proprietors of the firm of Rughnath Das, Hamir Mal at Hoshiarpur. There was certainly no attempt at concealment. We cannot, in face of these facts, hold that the retention of the old name of Rughnath Das Hamir Mal, a name which does not disclose the identity of the retired partners whom it is sought to hold liable, and the maintenance of a joint responsibility to Government as regards the treasury renders Kanak Mal or Chand Mal liable to the plaintiffs who only dealt with the firm after Dhanrup Mal had in fact become sole proprietor and who never had any definite knowledge of their existence. It follows that the appeal must be accepted and the suit against Kanak Mal and Chand Mal dismissed with costs.

Appeal allowed.

(¹) *L. R.*, 1 *C. P.*, 125.

No. 79.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

WASNA RAM,—(DEFENDANT),—APPELLANT,

*Versus*MUSSAMMAT UTTAM BAI,—(PLAINTIFF),—
RESPONDENT.

Civil Appeal No. 393 of 1900.

Custom.—Inheritance—Bhatias of Bannu District—Right of sister to succeed for life or until marriage.

In a suit, the parties to which were Bhatias of the Bannu District, held, that a sister was entitled to succeed for life or until marriage to the estate of her deceased brother.

Further appeal from the decree of Major E. Inglis, Divisional Judge, Derojat Division, dated 12th February 1900.

Lal Chand, for appellant.

Madan Gopal, for respondent.

The judgment of the Court was delivered by

19th June 1903.

ROBERTSON, J.—The facts of this case are given in the judgments of the lower Courts and need not be recapitulated at any length here.

The parties belong to the Bhatia caste of the Bannu District. The plaintiff is a minor daughter, Mussammatt Uttam Bai, of Milap Chand, and she is suing to set aside an alienation made by Nihal Chand, a second cousin of her father. When Milap Chand died, he left a son and a daughter, the son died in infancy, soon after his death, leaving the daughter, present plaintiff living. One Gurditta Mal had applied for guardianship before the son died, valuing the property at Rs. 6,544. He was appointed guardian on 4th May 1892. On 12th May 1892 the boy died, and after that no succession certificate was taken out, but on 18th April 1893, Nihal Chand, by registered deed, sold his whole interest in certain shops and houses, the property of the late Milap Chand, to Wasna Ram, defendant, for Rs. 1,500, and plaintiff, still a minor, sues for cancellation of this sale.

The plaintiff alleges that, according to custom, plaintiff is entitled to succeed to Milap Chand's property for life or until marriage, and this is the crucial question in the case, as if entitled to maintenance only, she would not be entitled to contest the alienation.

The oral evidence is not very strong either way, but the learned Divisional Judge is apparently right in his view that the trend of the evidence is to show little or no distinction between the rights of daughters and sisters, and in this case, when the son died in infancy, it is urged, not without force, that, according to custom, the case would be looked upon as an inheritance rather from Milap Chand, the father, than, as it may be strictly said to be, from the infant brother.

The two instances, on which the learned Divisional Judge has mainly relied, are no doubt cases of the succession of daughters. Neither are among Bhatias. The first case is among Aroras and the evidence of it is to be found in an executive record.

The case went before the Tahsildar who reported that Mus-sammat Gundi the daughter of the last owner, was entitled to the possession of her father's property, and this was upheld by the Extra Assistant Commissioner by order, dated 24th October 1885, and the petitioners were referred to a suit, which was never brought.

The second instance is given in the evidence of Tej Bhan, witness, who states that his own uncle's daughter succeeded her father. He also mentions another case of one Sundi and a third of one Sukami, but only one instance appears to have been accepted as authentic and in point. It cannot be said, therefore, that the affirmative evidence is very strong, but it is urged that no instances of daughters or sisters having been held entitled to maintenance only have been proved on the other side.

In weighing the evidence, however, it is necessary to consider who the parties are and where they come from. The parties are Bhatias, who come originally from the Gujrat tract of the Bombay Presidency, and it is a fact of importance in this case that, under the personal law binding the Bhatias of Gujrat, the rights of sisters to succeed to the whole estates of their brothers is fully recognized. The law applicable, where personal law applies, is personal and not local, so that Bhatias, if found to be under personal law and not custom, would *prima facie* be held to be under the personal law which they brought with them, and not the local law of other persons in the locality in which they have come to reside. This is well established.

It is, however, not contended by the respondents that the personal law of the Bhatias obtaining in Gujrat, Bombay Presidency, applies in its entirety. But in considering how far, and

in what directions, custom has modified personal law in the case of the Bhatias living in Bannu, the main principles of that personal law cannot be lost sight of, and must be held to have powerfully affected the question. The rights of sisters are fully recognized among Bhatias in Gujrat of Bombay.

We should, therefore, expect to find this principle strongly affecting the manner and extent to which the customs of those around them would modify their personal law.

Here we find that it is contended that sisters have the right to succeed till death or marriage, a claim less in extent than the right given by the personal law of Bhatias in Gujrat, and we consider that there is every reason to suppose that Bhatias would retain a more liberal view of the rights of sisters and daughters than would those whose personal law was originally less favourable to them.

Among such classes, therefore, we should accept much less proof that sisters are entitled to succeed, than would be required, say in the case of Aroras, who belong personally to a Hindu School, whose tenets are less favourable to sisters and daughters, and in this case, taking into consideration the origin of the parties, we hold that there is sufficient on the record to establish the plaintiff's claim to succeed for life, or until marriage, to the estate of her brother. The appeal is accordingly dismissed with costs.

Appeal dismissed.

Full Bench.

No. 80.

Before Sir William Clark, Kt., Mr. Justice Reid and Mr.
Justice Robertson.

HAKIM SINGH,—(PLAINTIFF),—APPELLANT,

Versus

CHARN DAS AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1417 of 1899.

Lis pendens—Alienation of property pending suit relating thereto—
Transfer of Property Act, 1882, Section 54.

Held, that dealings with the property in suit effected after notice of
suit brought in the Court of first instance and before the decision in
appeal by the final Court of appeal at whatever time between those two
periods they may occur, are dealings effected *pendente lite* and subject to
the doctrine of *lis pendens*.

Chet Singh v. Vadhawa Mal ⁽¹⁾ and *Muhammad Ashiq v. Pars Ram* ⁽²⁾
over-ruled.

Bellamy v. Sabine ⁽³⁾, *Sada Sivayyar v. Muttu Sabapathi Chetti* ⁽⁴⁾,
Sri-Sri-Sri-Gajapathi Radhika Patta Mahadevi Garu v. Sri Gajapati
Radhamani Mahadevi Garu ⁽⁵⁾, *Abboy v. Annamalai* ⁽⁶⁾, *Jogendra Chunder*
Ghose v. Fulkumari Dassi and others ⁽⁷⁾, *Venkatish Govind v. Maruti* ⁽⁸⁾,
Gobind Chunder Roy v. Guru Charan Karmokar ⁽⁹⁾, *Radhasyam Mohapatra*
v. Sibū Panda and another ⁽¹⁰⁾, and *Deno Nath Ghose v. Shama Bibi* ⁽¹¹⁾,
referred to and considered.

Further appeal from the decree of Major E. Inglis, Divisional
Judge, Sialkot Division, dated 22nd August 1899.

Lal Chand, for appellant.

Ishwar Das, for respondents.

This was a reference to a Full Bench made by Reid and
Robertson, JJ., to determine “whether dealings with property
“in suit effected after notice of suit brought in the Court of first
“instance and before the decision in appeal by the final Court of
“appeal are dealings effected *pendente lite* and subject to the
“doctrine of *lis pendens* at whatever time between these two
“periods they may occur.”

⁽¹⁾ 30 P. R., 1891.⁽²⁾ 56 P. R., 1896.⁽³⁾ I. R., XXVI L. J. Oh., 797.⁽⁴⁾ I. L. R., V Mad., 106.⁽⁵⁾ I. L. R., VII Mad., 96.⁽⁶⁾ I. L. R., XII Mad., 180.⁽⁷⁾ I. L. R., XXVII Calc., 77.⁽⁸⁾ I. L. R., XII Bom., 217.⁽⁹⁾ I. L. R., XV Calc., 94.⁽¹⁰⁾ I. L. R., XV Calc., 647.⁽¹¹⁾ I. L. R., XXVIII Calc., 23.

The order of reference was as follows:—

13th Feby. 1903.

ROBERTSON, J.—The facts and dates which are important in the consideration of this appeal are as follows:—

On the 29th of April 1896 one Shahu obtained a decree for the possession of part of the land in suit and a declaration in regard to the rest that the alienation made should not affect his reversionary rights against Charan Das, in the Court of the Divisional Judge of Sialkot.

On the 13th May 1896 an appeal against that decree was preferred to the Chief Court by Charan Das.

On 25th May 1896 Shahu sold his interests in the land in dispute to Khushal Singh's son, Hakim Singh, and to Bhagat Ram, son of Damodar Das.

On the 26th May the appeal was admitted to hearing and on 25th July 1896 service was served on Shahu.

On the 4th December 1897 the plaintiff Shahu compromised the case with Charan Das, appellant-defendant, and filed the compromise in this Court.

On 3rd January 1898 Hakim Singh and Bhagat Ram applied to be impleaded in the appeal. Also on 3rd January 1898 this Court decided they could not open up the fresh question whether plaintiff sold the property to Hakim-Singh Bhagat Ram, and refused to implead them on the appeal, and after attesting the compromise the appeal was, in accordance with its terms, accepted, and the Court went on to remark that the order was "not intended to affect any right that Hakim Singh and Bhagat Ram may have under their alleged deed of sale from Shahu."

Hakim Singh and Bhagat Ram in the case now before us, on appeal, sued Charan Das, Shahu and others for a decree giving them all that the original decree of 29th April 1896 had given to Shahu against Charan Das. Under that decree possession had been decreed to Shahu of the share of the land in question, sold by Makhan to Charan Das on payment of Rs. 139-8, Makhan, the alienor, having died and a declaratory decree had been passed that the alienation by Lehn and Satti to Charan Das should not affect Shahu except to the extent of Rs. 96. Makhan's share amounted to $\frac{2}{3}$ ths of a holding, and Lehn and Satti's to $\frac{1}{3}$ ths. The two latter alienors are alive.

The questions for us to decide at this stage of the case are, first, as to the whole $\frac{2}{3}$ ths of the holding whether the plain-

tiff's claim should not be dismissed on the ground that the sale to him was made *pendente lite*, and secondly whether as regards the $\frac{2}{3}$ ths in regard to which a declaratory decree only was passed, a decree in favour of a purchaser from a reversioner could be maintained in view of the principles laid down in a Full Bench ruling of this Court in *Tota and others v. Abdulla and another* ⁽¹⁾, followed in the judgment in *Malik Ala Bukhsh v. Ghulam and others* ⁽²⁾.

In support of the contention that the sale by Shahu of the land and interests decreed to him against Charan Das on 29th April 1897 to Hakim Singh and Bhagat Ram was a valid sale and not subject to the final result of the litigation between Shahu and Charan Das by reason of the operation of the principle of *lis pendens*, certain authorities were quoted which we will proceed to consider. Hakim Singh, it may be noted, is the son of one Sardar Khushal Singh, who, it is admitted, had been lending money to Shahu in support of the litigation in question.

The first ruling quoted to us was that in *Muhammad Ashiq and another v. Pars Ram and another* ⁽³⁾.

In that judgment it was held that when an *ex-parte* decree had been passed, a purchaser who bought while that decree was in force, where no application had been made to set it aside, was not affected by the subsequent course of events in the suit when that *ex-parte* decree came eventually to be set aside. The facts in that case were not on all fours with those in this case, and it was mainly cited to us because the learned Judges in that case remarked that they concurred in the exposition of the law of *lis pendens* in this country as contained in the judgment in *Chet Singh v. Wadhawa Mal* ⁽⁴⁾. This was the ruling mainly relied upon in support of his contention by the learned pleader for the appellant, and we accordingly proceed to consider. In that case, after discussing a large number of authorities, English and Indian, the learned Judges held, "that it is impossible to hold either with reference to the language of Section 52 of the Transfer of Property Act, or the exposition of the doctrine to be found in the reported cases that there can be any *litis pendencia* after the decree of the first Court, but before the filing of the appeal." In another part of the judgment (at pages 177, 178), it is remarked: "Nor it is the correct rule of

⁽¹⁾ 66 P. R., 1897.

⁽²⁾ 13 P. R., 1899.

⁽³⁾ 56 P. R., 1896.

⁽⁴⁾ 30 P. R., 1891.

“law that a suit does not become contentious till the summons has been served, can I see any sufficient reason for holding that an appeal becomes a contentious proceeding before the corresponding stage, *viz.*, when notice issues to the respondent.”

It is upon the view that precisely the same principle applies to the case of an appeal as to an original suit that the opinion expressed is based, and as it appears to us to be of very doubtful validity and contrary to the weight of extraneous authority, we feel constrained to re-open the discussion upon the point.

In the first place in this country, where the course of appeal is so different from what it is in England, it is *à priori* difficult to see how the case of an original suit and that of any appeal can in this connection be said to be on all fours. In the one case a suit may or may not be filed, in the other the parties are fully aware that a suit has been filed and has reached a certain stage, that further proceedings as of right are open to the opposite party, and will in all probability be taken, and any one purchasing from a holder of a decree of the first Court only must be presumed to be fully aware of this. There must always be a certain interval between a decree and the filing of the appeal, and to hold that, *qua* the parties to the decree, the case stands on the same footing as if there had been no proceedings as regards the doctrine of *lis pendens*, appears to us, on the face of it, an untenable assumption and, we venture to think, an assumption against which there is a great preponderance of authority.

The general principle of *lis pendens* need not be discussed at length here. It is well known. It can hardly be better laid down than in *Bellamy v. Sabine* (1): “It is scarcely accurate to speak of the *lis pendens* as affecting a purchaser upon the doctrine of notice, although the language of the Courts often so describes its operation. It affects him, not because it amounts to notice, but because the law does not allow to litigant parties, and give to them, pending the litigations, rights in the property in dispute, so as to prejudice the opposite party.” It can hardly be argued that it is not to the prejudice of the opposite party, when a decree has been obtained from the first Court only, to allow alienations to a third party which shall be unaffected by the subsequent course of the litigation.

(1) *L. R.*, XXVI *L. J.*, *Chan.*, 797.

This lays down the general principle and it has been always accepted as such in this country. Section 52 of the Transfer of Property Act, though that Act is not in force in the Punjab, has always been accepted as expressing the principles of the law of *lis pendens* obtaining here.

We now proceed to consider the authorities which have a more particular bearing on the matter before us.

In *Sada Sivayyar v. Muttu Sabapathi Chetti* ⁽¹⁾ it was held that a sale made in pursuance of a decree was rightly set aside when, on appeal, that decree was set aside, the purchaser being aware that an appeal had been preferred when he made the purchase. It is to be noted that it is not said that the purchaser had been served with notice of the appeal but merely that he was aware of its institution. In *Sri-Sri-Sri-Gajapathi Radhika Patta Mahadevi Garu v. Sri Gojapati Radhamani Mahadevi Garu* ⁽²⁾, a similar view was taken, the decree-holder in that case with full notice of the appeal pending having granted perpetual leases which were set aside when the decree was cancelled on appeal.

In *Abbey v. Annamalai* ⁽³⁾ it was held that a suit became contentious as soon as the filing of the plaint is brought to the notice of defendant, and in *Jogendra Chunder Ghose v. Ful-kumari Dassi and others* ⁽⁴⁾ it was clearly laid down that a suit may be held to be contentious before summons is actually served.

The judgment in *Venkatish Govind v. Maruti* ⁽⁵⁾ is not of great importance in this case, the decree in question in that case having in fact terminated the suits and having been passed and allowed to lie idle for seven years before the purchase which was called in question.

We now come to a ruling which requires more attention as we venture to think its application to the point before us is of considerable importance and as it was perhaps hardly fully considered in *Chet Singh v. Vadhawa Mal* ⁽⁶⁾.

The facts in the case of *Gobind Chunder Roy v. Guru Charan Karmokar* ⁽⁷⁾ were as follows :--

K sued P to recover possession of certain land. Whilst the suit was pending in the first Court the right, title and interest

⁽¹⁾ *I. L. R.*, V *Mad.*, 106.

⁽⁴⁾ *I. L. R.*, XXVII *Calc.*, 77.

⁽²⁾ *I. L. R.*, VII *Mad.*, 96.

⁽⁵⁾ *I. L. R.*, XII *Bom.*, 217.

⁽³⁾ *I. L. R.*, XII *Mad.*, 180.

⁽⁶⁾ 30 *P. R.*, 1891.

⁽⁷⁾ *I. L. R.*, XV *Calc.*, 94.

of P were sold in execution of decree against him at the instance of a judgment-creditor and purchased by G. Subsequent to G's purchase K's suit was dismissed by the Court of first instance, but K appealed and the Appellate Court reversed the decree of the Court below and gave judgment in K's favour. G, who was no party to the appeal, thereupon instituted a suit against K to eject him and obtain possession.

Here it will be noted that the facts were as regards the point before us on all fours with the facts in *Chet Singh v. Vadhawa Mal* ⁽¹⁾, with this exception that in that case the sale was made pending the decree in the first Court which supports the vendor's title, and in *Chet Singh v. Vadhawa Mal* the parties waited until after the decree of the first Court had been passed. The question being whether an alienation made before an appeal is filed is made *pendente lite* qua the appeal, from the point of view taken in *Chet Singh v. Vadhawa Mal* it would appear to be immaterial when the alienation was made provided it was made before notice of the appeal was given.

To resume the case of *Gobind Chundar Roy v. Guru Charan Karmokar*, the Calcutta High Court held that the doctrine of *lis pendens* prevailed and G was not entitled to maintain the suit. They based their view on the ground that proceedings in the Court of first instance and in appeal are one for purposes of application of the principle of *lis pendens*. They say, "the decree passed in the suit was the final decree pronounced (by the Appellate Court) on 20th September 1883. The proceedings in the Appellate Court were but a continuation of the proceedings in the suit, and although for a time there was a decree in favour of the present plaintiff's predecessor in title yet that was a decree which was open to appeal, and the decree having been appealed against we ought to take it that the decree of the Appellate Court was the decree in the suit, and the sale at which the plaintiff purchased having taken place pending the suit in which that decree was pronounced we think the doctrine of *lis pendens* does apply."

That judgment appears to us clearly to support the intention that as soon as a suit becomes contentious in the original Court it continues so if actively prosecuted until the final decision of the Appellate Court even during the period between the decree and the filing of the appeal (*Chet Singh v. Vadhawa Mal*,

⁽¹⁾ 30 P. R., 1891.

page 178). The judgment in *Rodhasyam Mohapatra v. Sibupanda and another* ⁽¹⁾ does not carry the case much further, it being held in that case on facts that the party concerned had had no notice of the suit and that the doctrine of *lis pendens* therefore did not apply.

We now come to consider the judgment of the Calcutta High Court in a case exactly on all fours, as regards the point in discussion, with that before us. This is the case of *Deno Nath Ghose and another v. Shama Bibi* ⁽²⁾. The facts are as follows:—

In execution of a decree the decree-holder applied for the sale of certain mortgaged property. Thereupon S objected to the sale on the ground that the property was trust property which on a partition had fallen to his share and was therefore not liable to sale in execution of the decree. The objection was allowed by the lower Court, on the 12th November 1892, and the decree allowing the objections was prepared on 20th February 1893. Subsequently the High Court, on appeal, reversed that decision and held that the property was liable to sale. Meanwhile, on 28th December 1892, the same property was purchased by B and D in execution of another decree against S. B and D were not however made parties to the appeal in the High Court.

Their Lordships after reciting the facts said, *inter alia*,—

“It has, however, been urged that the appellants purchased at a time when S's objection had been allowed and when no appeal against the Subordinate Judge's order had been preferred. We have been referred to Section 52 of the Transfer of Property Act which prohibits the transfer of property during the active prosecution in any Court of a contentious proceeding relating to such property. It is said that when the appellants purchased the suit of the defendant was not being actually prosecuted. Dr. Rash Behary Ghose has also referred us to Sugden on *Vendors and Purchasers*, page 758, and other English authorities
“.. The appeal was preferred without undue delay after the decree had been drawn up on February 20th, 1893. We therefore consider that the appellants in this case may be said to have purchased during the active prosecution of the suit.

⁽¹⁾ *I. L. R.*, XV Cal., 647. ⁽²⁾ *I. L. R.*, XXVIII Cal., 23.

“ Then, as to the English authorities cited by Dr. Rash Behary Ghose, we would only say that the law of *lis pendens* in England is different from that prevailing in this country. The law of *lis pendens* in this country is founded on the fact that it would be impossible to bring any suit to a successful termination if alienations *pendente lite* were permitted to prevail.

“ The case of *Gobind Chunder Roy v. Guru Charan Karmokar* ⁽¹⁾ is directly in point. In that case, the facts of which are very similar to those of the present one, it has been said: “ The proceedings of the Appellate Court were but a continuation of the proceedings in the suit, and although for a time there was a decree in favour of the present plaintiff’s predecessor in title, yet that was a decree which was open to appeal, and the decree having been appealed against we ought to take it that the decree of the Appellate Court was the decree in the suit, and the sale at which the plaintiff purchased having taken place pending the suit in which that decree was pronounced, we think the doctrine of *lis pendens* does apply to the case.”

It will be seen therefore that their Lordships of the Calcutta High Court have clearly and unequivocally laid down the principle that in this country the doctrine of *lis pendens* applies to all dealings with the property in suit, at least from the time when the summons of the Court of first instance is served on the defendant right up to the date of the final decree of the last Court of appeal. It would appear to us also that the Judges in *Chet Singh v. Vadhawa Mall* ⁽²⁾ somewhat under-estimated the force of the decision in *Gobind Chunder Roy v. Guru Charan Karmokar* ⁽¹⁾. In that last case the alienation in question was not affected adversely by the decision of the first Court, and if the principle of *Chet Singh v. Vadhawa Mall* ⁽²⁾ were correct, and an appeal is to be considered an entirely separate proceeding, inasmuch as the alienation was affected before notice was given of the appeal, the decision on appeal could not affect the matter as the sale would not be *lis pendens qua* the appeal. We have therefore in *Dino Nath Ghose v. Shama Bibi* ⁽³⁾ a ruling that an alienation of property in suit made between the date of the decree of the first Court and notice of appeal, is made subject

(¹) I. L. R., XV Calc., 94. (²) 30 P. R., 1891.
(³) I. L. R., XXVIII Calc., 23.

to the doctrine of *lis pendens* and is made *pendente lite*, and in the last quoted case reported in *Gobind Chunder Roy v. Gurn Charan Karmokar* ⁽¹⁾ an equally clear expression of opinion that any dealings with the property in suit made at any time between notice of the suit in the first Court and the date of the final decree of the last Court of appeal, is in this country to be held as made *pendente lite* and subject to the doctrine of *lis pendens*. With the exception of the ruling of our own Court in *Chet Singh v. Vudhawi Mal* ⁽²⁾ we are not aware of any authorities taking the contrary view. We ourselves concur in the opinion given in *Dino Nath Ghose v. Shama Bibi* ⁽³⁾, we find ourselves unable to follow the view taken previously by a Division Bench of this Court, and therefore find it necessary to refer the following point to a Full Bench for decision.

The question referred is, are dealings with property in suit effected after notice of suit brought in the Court of first instance and before the decision in appeal by the final Court of appeal, dealings effected *pendente lite* and subject to the doctrine of *lis pendens* at whatever time between these two periods they may occur?

This is the only point which it is.....necessary to refer to the Full Bench. We proceed, therefore, to decide all other points which it is necessary to dispose of.

The learned Judge then proceeded to discuss the remaining pleas of the plaintiff which are not material for the purposes of this report.

The judgments delivered by the learned Judges, who constituted the Full Bench, were as follows :

CLARK, C. J.—The question referred and the authorities on 25th April 1903. the subject have been fully discussed in the referring order of the learned Judges.

I concur in the view held by those Judges. I admit that the cases specially relied upon in that order, *Gobind Chunder Roy v. Gurn Charan Karmokar* ⁽¹⁾, and *Dino Nath Ghose v. Shama Bibi* ⁽³⁾ are not exactly in point, and I would base my decision rather on the general ground advanced in that order than on precedents. The law of appeal “the inevitable appeal,” as it is called in the later Calcutta judgment referred to above, is so different in this country and, in England, that the principles of *lis pendens* in England cannot be applied to this country as regards the question referred.

⁽¹⁾ I. L. R., XV Cal., 94.

⁽²⁾ 30 P. R., 1891.

⁽³⁾ I. L. R., XXVIII Cal., 23.

The prosecution of a case between the decree of the first Court and the filing of the appeal, may be and generally is as active, and the case as contentious as at any time during the pendency of the suit in the first Court. The wording of Section 52 of the Transfer of Property Act no doubt runs, "the active prosecution in any Court of a contentious suit or proceeding," but I do not feel any difficulty in giving a liberal construction to the words "in any Court," and holding that what is meant is the active prosecution of a case or a litigation, and that it covers the period between the passing of the decree and the filing of the appeal. *Dino Nath Ghose v. Shama Bibi* (1) is at all events a good authority for holding that the suit was being actually prosecuted between the dates of passing the order and filing the appeal, it also lays down "that the law of *lis pendens* in England is different from that prevailing in this country. "The law of *lis pendens* in this country is founded on the fact that "it would be impossible to bring any suit to a successful termination if alienations *pendente lite* were permitted to prevail." If the doctrine of *lis pendens* did not prevail between the date of decree and the decision of the Appellate Court, it would be open to litigants to avoid the law of appeal altogether, and to clinch any patently wrong or insufficient decree by immediately proceeding to alienate the property awarded by the decree.

In my opinion, then, a suit as soon as it becomes contentious in the original Court, continues so ordinarily until the final decision of the Appellate Court, and should ordinarily be held to be actively prosecuted even during the period between the decree and the filing of the appeal.

It might no doubt be shown that there was an acceptance of the decree of the first Court or great *laches* in prosecuting the litigation, but it would lie upon the party making such allegations to establish them.

This opinion is supported by the decision in *Gobind Chunder Roy v. Guru Charan Karmokar* (2), where their Lordships say: "The proceedings in the Appellate Court were but a continuation of the proceedings in the suit, and although for a time there was a decree in favour of the plaintiff's predecessor in title, yet that was a decree which was open to appeal, and the decree having been appealed against we ought to take it that the decree of the Appellate Court was the decree in the suit and the sale at which

(1) I. L. R., XXVIII Cal., 23.

(2) I. L. R., XV Cal., 94.

“the plaintiff purchased having taken place pending the suit in which that decree was pronounced we think that the doctrine of *lis pendens* does apply.”

I would, therefore, answer the question referred by saying that dealings with property in suit effected after notice of suit brought in the Court of first instance, and before the decision in appeal by the final Court of appeal are dealings effected *pendente lite* and subject to the doctrine of *lis pendens* at whatever time between these two periods they may occur.

REID, J.—For reasons recorded in the referring order of the 13th February 1903, and by the learned Chief Judge, I concur in the proposed answer. 28th April 1903.

ROBERTSON, J.—For reasons given in the referring order of the 13th February 1903 and in the learned Chief Judge's judgment I concur in the proposed answer. 28th April 1903.

No. 81.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Robertson.

THE KRISHNA MILLS COMPANY, LIMITED, DELHI,—

(DEFENDANT),—APPELLANT,

Versus

GOPI NATH,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 369 of 1901.

Public Company—Contract on behalf of Company—Directors and officers—Warranty of authority—Duty of third parties to see that the Directors and Officers are acting within their authority—Presumption as to observation of formalities requisite to confer authority upon Directors.

Although any one dealing with a Joint Stock Company is bound to satisfy himself that the Agent or Director with whom he acts as representing the Company is acting within the powers which such Agent or Director might possess under the Articles of Association, it is not incumbent on him to ascertain whether the necessary formalities or proceedings have been held or performed requisite to confer such powers on such Agent or Director, and therefore where the person dealing with a Company has satisfied himself that such dealings by an Agent or Director are amongst those which an Agent or Director might perform within the scope of the Company's Articles of Association and could be validly entered into by such persons duly empowered on behalf of the Company, and he finds an Agent or Director of the Company entering into such dealings on behalf of the Company, and acting as if he the Agent or Director had been duly empowered, he is entitled to infer the fact of the necessary authorisation to act and to maintain an action on account of damages caused by the

} APPELLATE SIDE.

Company's non-compliance with the terms of a contract made with him whether through his Agent or personally, and is not bound to enquire further whether as a matter of fact such representative of the Company has been so empowered by the Company, or that all the proceedings of the Company and its Directors have all been strictly regular.

Ernest v. Nicholls ⁽¹⁾, *Fontaine v. Carmarthen and Cardigan Railway Company* ⁽²⁾, *Royal British Bank v. Turquand* ⁽³⁾, *Smith v. The Hull Glass Company* ⁽⁴⁾, *Agar v. Athenzum Life Insurance Society* ⁽⁵⁾, *Davies v. Bolton* ⁽⁶⁾, *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Company* ⁽⁷⁾, *Biggerstaff v. Rowatt's Wharf Lt.* ⁽⁸⁾, *Prince of Wales' Insurance Society v. Athenæum Insurance Society*, ⁽⁹⁾, *Duck v. Lower Galvanizing Company, Ltd.* ⁽¹⁰⁾, and *Mahony v. East Holyford Mining Company* ⁽¹¹⁾ referred to.

First appeal from the decree of A. Langley, Esquire, District Judge, Delhi, dated 25th February 1901.

Madan Gopal and Girdhari Lal, for appellants.

Shadi Lal, Lal Chand and Piyare Lal, for respondent.

The facts of the case are fully stated in the judgment of the Court delivered by

3rd Aug. 1903.

ROBERTSON, J.—There does not appear to be much doubt about the main facts in this case.

Plaintiff is a merchant at Hathras, and defendants are the Krishna Mills Company, Limited, at Delhi. It appears that one Anandi Lal holds a general power-of-attorney from plaintiff, Gopi Nath, which empowers him to do many acts connected with the institution and defence of suits and kindred matters, but which distinctly did not empower Anandi Lal to enter into the contract, which is the subject of this suit, on behalf of Gopi Nath.

On 12th July 1899, however, Anandi Lal did enter into a contract, in which he and his minor son, Ganga Parshad, were the parties on one side, and Basheshar Nath, a Director of the Krishna Mills Company, on behalf of the Mills, on the other side. According to this agreement, the defendant Company undertook to deliver, on demand and on payment of cash, 1,000 bales of yarn, within six months at the rate of 166 bales per month. The yarn was to be of five counts, $10\frac{1}{2}$, $12\frac{1}{2}$, $13\frac{1}{2}$, $14\frac{1}{2}$, $16\frac{1}{2}$, the price

⁽¹⁾ L. R., 6 H. L. C., 401.

⁽²⁾ L. R., 5 Ex., 316.

⁽³⁾ 24, L. J., Q. B., 327.

⁽⁴⁾ L. R., 11 C. B., 897.

⁽⁵⁾ L. R., 3 C. B., 725.

⁽⁶⁾ L. R., 3 Ch. Dn. (1894), 678.

⁽⁷⁾ L. R., 1 Ch. Dn., (1895), 629.

⁽⁸⁾ L. R., 2 Ch. Dn., 93.

⁽⁹⁾ L. R., 3 C. B. N. S., 756.

⁽¹⁰⁾ L. R., 2 K. B., 349.

⁽¹¹⁾ L. R., 7 H. L., 869.

fixed being Rs. 2-2-9 per bundle (40 bundles = 1 bale) for the lowest count, with an increase of anna 1 per bundle for each superior count. Two hundred bales were to be of counts $14\frac{1}{2}$ and $16\frac{1}{2}$. If Anandi Lal did not take delivery within one month, a demurrage should be charged, and, after a certain interval and on notice the Company might sell the yarn. The contract is printed at page 28 of the paper book.

Gopi Nath, on hearing of the contract, appears to have been frightened at its magnitude and at first desired to repudiate any responsibility. How far the statements on this point are correct we are unable to say, but they appear to be immaterial. The price of yarn rose, it became clear that the bargain was a very bad one for the Company and a very good one for Anandi Lal, and, accordingly, on 26th August 1899, Gopi Nath got Anandi Lal to make over all his claims to the bargain to him in consideration of Rs. 2,000. It will save time if we say at once that whatever criticisms may be passed on the form of the transaction, we consider that agreement to have conferred on Gopi Nath all the rights of Anandi Lal against the Company under the agreement of 12th July 1899, and we consider that Gopi Nath's rights in the matter were created on, and affirmed by, that transaction, and that he was, so far as that part of the question is concerned, capable of suing and enforcing such rights as pertained to Anandi Lal on the 24th August. Gopi Nath, as is admitted, twice gave the defendant Company notice of the assignment, and called on them to fulfil their contract, but they took no notice.

Prior to the 26th August 16 bales of yarn had actually been delivered to Anandi Lal between 12th July and 28th July.

Upon these facts Gopi Nath brought a suit claiming Rs. 12,960, on the allegation that the average price of yarn in July, August, September, October 1899, had been Rs. 2-10-9, the difference between that and Rs. 2-2-9 being his loss per bundle.

We need not discuss all the pleas, as we have already pointed out that we have no doubt as to Gopi Nath's rights after the 26th August under his agreement with Anandi Lal, whatever they may have been before. Indeed we are of opinion that there is nothing to show that he had any right in the contract prior to 26th August.

In the pleas receipt of notice of Gopi Nath's position on 27th August and 4th September was admitted.

The first plea is that no valid contract was made by Anandi Lal with the defendant Company. The alleged contract was entered into by Basheshar Nath without authority. This is a very important plea, which will be considered fully later on. Delivery of 16 bales was admitted. It is urged that shortly after the contract plaintiff disclaimed Anandi Lal's authority and repudiated all connection with the contract. Even if established, this is immaterial. Gopi Nath had no connection up to the 26th August with the contract, after he bought Anandi Lal's rights on that date, he had, and it is not alleged that he repudiated it after that date.

It is further urged that Anandi Lal took no further deliveries under the contract and so committed breach of it. Notice was given on 27th August of Gopi Nath's substitution for Anandi Lal, and there was no refusal to take delivery by Gopi Nath, and here we may at once dispose of another point of some little importance and clear the ground. It has nowhere been urged that before 26th August 1899 Anandi Lal had actually abrogated the contract. In the pleas it is urged that, after the said notice, Anandi Lal countermanded delivery to plaintiff (plea 9). Basheshar Nath says he told Anandi Lal that, owing to his failure to take delivery of any considerable portion, the contract was almost null, because there was no hope of his taking delivery. Lala Sri Kishen, who was the actual Agent, says Anandi Lal came to him before the notice and claimed the contract as his own, and there is no evidence of actual repudiation by Anandi Lal prior to 26th August, or prior to the notice given of the assignment to Gopi Nath on the 27th August. We, therefore, find that Gopi Nath was, when he took over the bargain on 26th August, in the same position as Anandi Lal had been, and that Anandi Lal had not repudiated the contract. After the assignment any repudiation by Anandi Lal would have been of no effect.

The case has, therefore, reached this stage, that the question to be decided is whether or not the contract entered into, on 12th July, by Anandi Lal and by Basheshar Nath on behalf of the defendant Company, was valid and binding on the Company? If it was, Gopi Nath was entitled to relief in accordance with its terms.

We turn now to consider what was the position of Basheshar Nath.

Under the Articles of Association, of which the public are to be held cognisant, Article 113, Lala Sri Kishen Das, Gurwala, Banker, was appointed permanent Agent of the Company, he, his heirs and successors, for 99 years; he was to receive certain remuneration and to guarantee the Company against any bad debts in the sales, and manage and conduct all the business of the Company, and do any other work the Company may empower him to do.

There is no specific power of delegation given, and no specific power retained to appoint any one temporarily in Sri Kishen Das's place, when he should be absent. All the sales were apparently in the Agent's hands, but, to meet emergencies and small purchases, two resolutions were passed by the Board of Directors, one on 25th January 1899, appointing two Directors for one year to supervise the sale of yarn. Clause (3) of the resolution says, "As regards wholesale transactions, it is 'necessary to consult the Agent. A wholesale transaction 'means a sale of 100 bales at a time.'"

Sheikh Hafizulla and Lala Jawala Parshad were appointed, but Jawala Parshad did not become a Director and Basheshar Nath took his place, under resolution of 4th March 1899. (See paper book, pages 25-26). Basheshar Nath and his colleague Hafizulla seem from their evidence to have had somewhat different ideas of their powers, but the resolution makes them clear.

At the time of the transaction now under dispute, Lala Sri Kishen Das was away, and Basheshar Nath was clearly acting, so far as that was possible, as agent in his place. Sheikh Hafizulla, his Co-sale Director, and a Director of the Company, says clearly, "Lala Basheshar Nath represented Lala Sri Kishen Das 'and the Secretary during their absence. At the time of the 'contract in dispute Lala Basheshar Nath was so representing,'" and the evidence of Baij Nath, a clerk of the defendants, and of Basheshar Nath himself, supports this view.

No doubt the resolution quoted above meant that Bashasher Nath and Hafizulla should act together as to sales, and they do not in fact cover the action of Basheshar Nath in this case. But it is urged that, in addition to his position as Director and Co-sale Director, Basheshar Nath was acting as agent, and was vested with the authority of an agent, or, if not in fact so invested, that he was held out by the Company to the public as a person so invested with authority to bind the Company. We think that this is clearly the case. Basheshar Nath, as appears

from the evidence, did enter into several other contracts exceeding 100 bales, and these have been in fact carried out. He gave all orders for the entry of contracts in the books, and he was clearly treated by the Company and its servants as acting Agent. He entered into the contract with Anandi Lal, and he is still a Director. The truth appears to be as stated by Basheshar Nath himself, that the contract with Anandi Lal was meant as a piece of bluff, to be used to raise prices on others, Basheshar Nath calculating that Anandi Lal being a poor man could never take delivery. It came upon the defendants as a shock to find that, instead of the "of-no-account" Anandi Lal, they were confronted with the well-to-do Gopi Nath as the other party to the contract, which they were now called upon to fulfil to the letter. We think Anandi Lal was entirely justified in looking upon Basheshar Nath as the Company's Agent, with powers to bind the Company in respect of the contract in question.

The question remains on these facts, is the Company bound by the contract entered into by Basheshar Nath ?

Now it is quite clear that, under certain circumstances, under Articles 114, 115, 116, 117 of the Articles of Association, Basheshar Nath might have been validly appointed to do all that he did. It is true that under Article 114 a General Meeting would have to be called before this could be done, and it is contended by the counsel for the appellants that the plaintiff was bound to look up the minutes, and to see if any such resolution as was necessary under the Articles had been passed at a General Meeting, and that, not having done so, the Company were not bound by the act of Basheshar Nath.

No doubt it may now be taken as fairly established that persons, who deal with a Company whose regulations are registered and are, therefore, accessible to the public, cannot hold the Company liable if the Directors exceed the authority disclosed by the regulations. *Ernest v. Nicholls* ⁽¹⁾ and *Fountain v. Carmarthen and Cardigan Railway Company* ⁽²⁾, but it may be taken also as settled that persons dealing with Directors, and without notice of irregular or improper exercise of their powers, are not affected by such irregularity or impropriety (Lindley on *Company Law*, 5th edition, p. 167, 6th edition, p. 219).

The case of *Royal British Bank v. Turquand* ⁽³⁾ is very much in point. In that case a Company's deed, registered under 7

(1) *L. R.*, 6 *H. L. C.*, 401.

(2) *L. R.*, 5 *Ex.*, 316.

(3) 24, *L. J. Q. B.*, 327.

and 8 Victoria, C. 110, empowered the Directors to borrow on the bonds of the Company such sums as by a general resolution of the Company might be authorized to be borrowed. The Directors gave the bankers of the Company a bond for £ 1,000 sealed with the seal of the Company and signed by two Directors, as a security for what might be due from the Company and its bankers on the current account. This was not authorized by any resolution of the Company, and it was, therefore, contended that the bond was invalid. There was no question here as to the form of the bond or as to the authority of those who issued it to act for the Company. The Company was *prima facie* bound by the bond, and no one looking only at the deed of settlement and the bond could come to a different conclusion. The only question was whether the bankers were bound to look further and to ascertain whether the issuing of the bond had been *authorized by a resolution* of a General Meeting. It was held that they were not. Jervois, C. J., said on appeal, affirming this finding: "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and deed of settlement, but are not bound to do more, and the party here on reading the deed of settlement would not find a prohibition from borrowing, but a permission to do so, under certain conditions. Finding that the authority might be made complete by a resolution, he could have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

In *Smith v. The Hull Glass Company* ⁽¹⁾, Maule, J., laid it down that "the public were entitled to assume that a person acting as the Agent of a Company had been duly appointed by the Directors, for by the Company's deed of settlement they had power to appoint persons to carry on the business." In *Agar v. The Athenæum Life Insurance Society* ⁽²⁾, the Directors had power to borrow, but only with the consent of an extraordinary General Meeting of the shareholders. They did borrow by issuing debentures sealed with the seal of the Company and signed by two of themselves, and it was held that these debentures were binding on the Company, although no such authority to borrow had been conferred by a General Meeting as was contemplated by the Company's deed of settlement.

(1) *L. R.*, 11 C. B., 897. (2) *L. R.*, 3 C. B., 725.

Davies v. Bolton & Co. ⁽¹⁾ is another case which is somewhat in point, and in the *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Company* ⁽²⁾, some important remarks are made by the Lord Chancellor (Lord Halsbury). In that case it was shown that a quorum of Directors must consist of more than two under an internal regulation of the Company. Certain acts were done by two Directors only. Lord Halsbury remarked: "All the public documents with which an outside person would be acquainted in dealing with the Company would only show him that, by some regulations of their own, what Lord Hatherby described as their in-door management, they were capable, if they thought right, of making any quorum they pleased, and an outside person, when he found a document sealed with the common seal and attested and signed by two of the Directors and the Secretary, was entitled to assume that that was the mode in which the Company was authorized to execute an instrument of that description." Some further observations on the same point may be quoted from *Biggerstaff v. Rowatt's Wharf Lt.* ⁽³⁾. Lindley, J., remarks: "What must persons look to when they deal with Directors? They must see whether according to the constitution of the Company the Directors could have the powers which they are purporting to exercise It is settled by a long string of authorities that when Directors give a security, which according to the articles they might have power to give, the person taking it is entitled to assume that they had the powers."

A similar view was also taken in *Prince of Wales' Insurance Society v. The Athenæum Insurance Society* ⁽⁴⁾. In regard to the appointment of Directors by a Company the rules are much more stringent, but even as regards Directors, if a Company does in fact carry on business by certain persons, who are allowed by the shareholders to act as if they were duly constituted Directors of the Company, the Company will be bound by the acts of such persons at all events in ordinary matters of business in favour of all persons *bond fide* dealing with them, without notice of their insufficiency in number or defective appointment (see *Duck v. Lower Galvanizing Company, Limited* ⁽⁵⁾, and *Mahony v. East Holyford Mining Company, Limited* ⁽⁶⁾).

The conclusion to be drawn from these and other authorities on the same point, which take a similar view, is that, though

⁽¹⁾ L. R., 3 Ch. Dn. (1894), 678. ⁽⁴⁾ L. R., 3 C. B. N. S., 756.

⁽²⁾ L. R., 1 Ch. Dn. (1895), 629. ⁽⁵⁾ L. R., 2 K. B., 349.

⁽³⁾ L. R., 2 Ch. Dn., 93. ⁽⁶⁾ L. R., 7 H. L., 869.

any one dealing with a Company is bound to satisfy himself that the person with whom he acts as representing the Company is acting within the powers which he might possess under the Articles of Association in this country, he is not bound to see that the necessary formalities or proceedings held requisite within the Company to confer such powers upon him have been observed. If a person dealing with a Company has satisfied himself that such dealings are within the scope of the Company's Articles of Association and could be validly entered into by persons duly empowered on behalf of the Company, and he finds a representative of the Company entering into such dealings on behalf of the Company and acting as if duly empowered, he is not bound to enquire further whether, as a matter of fact, such representative of the Company has been so empowered by the Company. He is entitled, in the words of Jervois, C. J., to infer the fact of the necessary authorization.

Here it is quite clear that Basheshar Nath was acting on behalf of the Company on their premises and in control of their establishment in a manner in which he might have been authorized by the Company at a General Meeting to act. In *the Royal British Bank v. Turquand*, the defence was much the same as it is on this point in the case before us, i. e., it was admitted that the act done might have been authorized by a general resolution of the Company, but it was contended that the act was invalid, as no such resolution was in fact passed. It was held that the other party was entitled to assume it.

Here it is contended that only a General Meeting could, under special circumstances, have authorized Basheshar Nath to act as he did, but that no General Meeting gave the necessary authorization. Following the rulings quoted, we hold that, under the circumstances, Anandi Lal was entitled to infer that all that was necessary to authorize Basheshar Nath to act as he did had in fact been done.

Section 67 of the Indian Companies Act provides that contracts, which, if made between private persons, would by law be valid, may be made on behalf of a Company by any person acting under the express or implied authority of the Company. There can be no question here that Basheshar Nath had an implied authority from the Company to enter into this contract, and it is in evidence that other contracts of a similar nature so entered into by him have been executed and not repudiated.

We do not consider it necessary to discuss at length the question whether Basheshar Nath could bind the Company as a sub-agent of Lala Sri Kishen Das, and the authorities quoted on this point. There is something to be said for the contention on both sides, but it is not necessary to discuss it as we have found that the Company is bound by the acts of Basheshar Nath which it could have authorized him to do, and which it clearly held out to the other party to the contract that it had authorized him to do.

We hold, therefore, that the defendant Company is bound by the terms of the contract, and that Gopi Nath is entitled to compensation for its breach. We proceed to consider what the amount of that compensation should be. The contract was entered into on 12th July 1899 and was for the delivery of 1,000 bales within six months at 166 bales per month, which we take to mean 166 bales in each of the months of July, August, September, October, November, and December. It is quite clear that the failure to deliver more than 16 bales in July and August was due to the inability of Anandi Lal to receive it, and not to the failure of the Company to supply it. Gopi Nath did not take over the contract till 26th August and notify it till 27th August, and there was no reasonable time within which to make delivery of the August instalment. We hold, therefore, that plaintiff is entitled to compensation in respect of the bales not delivered under the contract in September and October up to the time of suit, therefore compensation was only due in respect of September and October. The rate allowed by the lower Court is Rs. 2.10.0, which was the rate claimed. There is certainly nothing on the record to indicate that this rate is too high. The evidence of Gopal Rai (p. 9, paper book) would show it to be if anything low. We see no reason, therefore, to interfere with the rate allowed, and we give the plaintiff a decree for Rs. 6,640. The appeal is, therefore, so far accepted as to reduce the amount decreed by Rs. 3,320. The plaintiff is decreed Rs. 6,640 with costs on that amount in the first Court, and costs in this Court will be proportional to the amount decreed and reduced.

No. 82.

Before Sir William Clark, Kt., Chief Judge.

GANGA RAM,—(PLAINTIFF),—PETITIONER,

Versus

KARAM DIN,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Civil Revision No. 1433 of 1902.

Occupancy rights—Sale of right of occupancy under Section 6 of the Punjab Tenancy Act by landlord in execution of a money decree against the tenant—Punjab Tenancy Act, 1887, Sections 6, 56.

Held, that by Section 56 of the Punjab Tenancy Act rights of occupancy under any other section than Section 5 are absolutely protected from attachment and sale in execution of decree, not only against third parties but equally against the tenant's landlord.

Petition for revision of the order of Mian Nizam-ud-din, District Judge, Sialkote, dated 31st January 1902.

Harsukh Rai and Rambhaji Datta, for petitioner.

Shahab Din, for respondent.

The judgment of the learned Chief Judge was as follows:—

CLARK, C. J.—Though there was insufficient ground for the District Judge to review his order, yet I do not feel bound to interfere on the revision side, if the District Judge's later order is correct. 7th July 1903.

Defendant is an occupancy tenant under Section 6 of the Punjab Tenancy Act, and plaintiff is his sole landlord.

The question is whether, with reference to Section 56 of that Act, the landlord can sell up the tenant's holding in execution of a money decree?

The argument for the landlord is that, as the holding of a tenant under Section 5 can be sold, *à fortiori*, the holding of a tenant under Section 6, a lesser right, can be sold, and that the section is only intended to protect the right of the landlord, and does not apply where the landlord himself seeks to sell the holding.

As regards the principle on which the lesser right is reserved, while the greater right is made liable to sale in execution of decree, it may be that, as proprietary right is liable to be sold in execution of decree, the greater right was held to be analogous to proprietary right and for this reason not protected.

The wording of the section is clear and a comparison with the previous sections, which deal with tenancies under Section 5,

shows that, while voluntary sales as regards the latter are dealt with in Section 53, and involuntary sales under Section 55, both kinds of sales in the case of occupancy rights under Section 6 are dealt with together in Section 56 and involuntary sales are barred and voluntary sales can only be made by consent in writing of the landlord.

The distinction is even more clearly brought out in the Central Provinces Tenancy Act, XI of 1898, Sections 39—43 and Section 46. Also in the Government Tenants (Punjab) Act, III of 1893, the rights of tenants are reserved from sale in execution of decree.

The intention of the Government, therefore, appears to agree with the plain words of Section 56, and to protect the holdings of tenants under any other section than Section 5 from sales in execution of decree.

As regards the argument that the section is only intended to protect the rights of landlord, and does not apply where the landlord himself seeks to sell the holding.

No doubt the Act deals mostly with the rights of landlords and tenants *inter se*, but it does not do so exclusively. This very Chapter V deals with the rights of succession among the tenants to the rights of occupancy.

I hold then that, by Section 56, rights of occupancy under any other section than Section 5 are absolutely protected from attachment and sale in execution of decree, not only against third parties, but equally against the tenant's landlord.

The revision is dismissed with costs.

Application dismissed.

No. 83.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

RALLIA RAM AND OTHERS,—(DEFENDANTS),—
PETITIONERS,

Versus

GOKAL CHAND,—(PLAINTIFF),—RESPONDENT.

Civil Revision No. 1286 of 1902.

Small Cause Court suit—Munsif trying case withdrawn from Small Cause Court—Finality of order of Munsif—Civil Procedure Code, 1882, Section 25.

Plaintiff filed his suit as a Small Cause Court case in the Court of the District Judge at Ferozpur with a note that it was triable by the Small

REVISION SIDE. }

Cause Court, but as the Judge of that Court was related to one of the parties it should not be sent to him. It was accordingly sent to an additional Munsif without Small Cause Court powers by order of the District Judge. After decision by that Munsif an appeal was preferred to the District Judge and decided by him.

Held, that the action of the District Judge in sending the case to the Additional Munsif amounts to transfer within the meaning of Section 25, Civil Procedure Code, the Additional Munsif must be deemed for the purposes of this suit to be a Court of Small Causes under the last clause of that section, and his decision was therefore not open to appeal.

Ram Chandra v. Ganesh ⁽¹⁾ dissented from.

Mangal Sen v. Rup Chand ⁽²⁾, *Kauleshar Rai v. Dost Muhammad Khan* ⁽³⁾, *Parsick v. Buta Mal* ⁽⁴⁾, *Alla Din v. Mul Chand* ⁽⁵⁾, and *Saidhu Mal v. Hassu* ⁽⁶⁾ followed.

*Petition for revision of the order of Munshi Muhammad Ali,
District Judge, Hoshiarpur, dated 26th March 1902.*

Shadi Lal, for petitioners.

Sukh Dial, for respondent.

The judgment of the Court was delivered by

ROBERTSON, J.—The facts in this case are as follows:—One *27th June 1903.*
Banna Mal was holding the office of Munsif, with Small Cause Court powers up to the limit of Rs. 100. A Small Cause Court case was instituted in his Court, but, as the Munsif was related to one of the parties, on petition noted in the plaint, the case was transferred for hearing to the Court of another Munsif, without Small Cause Court powers. After decision by that Munsif, an appeal was preferred to the District Judge and decided by him. It is now urged that, as the case was a Small Cause Court one transferred from a Court which had the power to try it as a Small Cause Court, under Section 25, Civil Procedure Code, the Court which tried it acted *qua* the case as a Small Cause Court and no appeal lay.

It is urged that Section 25, Civil Procedure Code, last clause, applies to Courts invested with the jurisdiction of Courts of Small Causes, as well as to Courts of Small Causes pure and simple, in respect of cases triable as Courts of Small Causes. The clause runs "the Court trying any suit withdrawn under "this section shall for the purposes of such suit be deemed to be "a Court of Small Causes."

⁽¹⁾ *I. L. R.*, XXIII Bom., 382.

⁽²⁾ *I. L. R.*, XIII All., 324.

⁽³⁾ *I. L. R.*, V All., 274.

⁽⁴⁾ 80 *P. R.*, 1887.

⁽⁵⁾ 74 *P. R.*, 1896.

⁽⁶⁾ 58 *P. R.*, 1897.

The principal authority against the contention of the applicant is the judgment in *Ram Chandra v. Ganesh* ⁽¹⁾, in which it was held that the clause in Section 25, Civil Procedure Code, only applies to regular Courts of Small Causes, mainly on the ground, apparently, that Section 5 of the Civil Procedure Code mentions both kinds of Courts as something different from each other.

We are not able to give the same force to Section 5, Civil Procedure Code, as has been given to it in the judgment quoted above. Section 5, Civil Procedure Code, appears to us to be simply explanatory in this connection. If the argument used by the Judges of the Bombay High Court were correct, Courts invested with the powers of Courts of Small Causes would not come within the purview of Section 203, Civil Procedure Code, either, and it is further to be observed that Section 5 extends the provisions of all the sections and chapters of this Code specified in the second schedule to Courts exercising the jurisdiction of a Small Cause Court as well as to Courts of Small Causes. Under that schedule, therefore, Section 25, Civil Procedure Code, applies to Courts exercising the powers of a Court of Small Causes equally with a Court of Small Causes. But a further clue to the intention of the legislature appears to us to be given in Section 33 of the Provincial Small Cause Courts Act, which recites that a Court invested with the jurisdiction of a Court of Small Causes, with respect to the exercise of that jurisdiction, and the same Court with respect to the exercise of its jurisdiction in suits of a Civil nature, which are not cognizable by a Court of Small Causes, shall, for the purposes of this Act and the Code of Civil Procedure, be deemed to be different Courts. This appears to us to mean clearly that, for the purposes of trial of cases cognizable by a Court of Small Causes, such Court is *qua* such cases to be considered a Court of Small Causes pure and simple, and consequently coming within the purview of all the rules and procedure laid down for Courts of Small Causes, unless there is a special provision to the contrary; and it would appear to us that the terms of Section 5, Civil Procedure Code, are rather calculated to make this clear, than to differentiate between these Courts and regular Courts of Small Causes in such matters. We can see no logical reason for such differentiation, and we are unable to see that Section 5, Civil Procedure Code, which specifically includes all other Courts

⁽¹⁾ I. L. R., XXIII Bom., 382.

exercising the jurisdiction of a Court of Small Causes within the purview of schedule II, and so within the purview of Section 25 operates to exclude such Courts from the operation of Section 25, last clause. It appears to us rather that, under Section 33 of the Small Cause Courts Act, a Court, invested with the powers of a Court of Small Causes, *is* a Court of Small Causes *qua* cases falling within its Small Cause Court's jurisdiction, and subject to the same rules and incidents as a regular Court of Small Causes, unless it is specifically laid down by competent authority to the contrary.

In our opinion, therefore, the case in discussion was tried by the Munsif as a Court of Small Causes, under Section 33 of the Small Cause Courts Act, and that, in view of Section 30 of the Courts Act, Sections 30—32, 33 of the Provincial Small Cause Courts Act, and Section 5, Section 25, Section 203 and the second schedule of the Civil Procedure Code *inter alia*, no appeal lay. This is the view taken in *Mangal Sen v. Rup Chand* ⁽¹⁾, concurring with the view taken in *Kauleshar Rai v. Dost Muhammad Khan* ⁽²⁾ by the same Court. The view taken by Mr. Justice Roe in *Allah Din v. Mul Chand* (851 of 96) goes even further on some points, but in that case and in *Parsick v. Buta Mal* ⁽³⁾ the Courts from which the transfers were made were Cantonment Small Cause Courts. The learned pleader for the respondents urged that there had been no formal transfer, the case having been sent originally to the Court of Maddan Singh, Additional Munsif. But we think this is untenable. The plaint was put into the Court of the District Judge as usual, with a note that it was triable by Bannu Mal as a Small Cause Court, but as he was related to one of the parties it should not be sent to him. It was accordingly sent to Maddan Singh, Additional Munsif, by order of the District Judge. We think clearly, following the authorities on this point (*inter alia* *Parsick v. Buta Mal* ⁽³⁾, *Alla Din v. Mul Chand* ⁽⁴⁾, and *Saidhu Mal v. Hassu* ⁽⁵⁾), that this must be taken to be a transfer under Section 25, Civil Procedure Code. Had it not been so, Maddan Singh could not have entertained the case.

We accordingly accept the application for revision and set aside the order of the District Judge, as without jurisdiction, and restore that of Hardial, Munsif. Costs against respondent.

Application allowed.

(1) I. L. R., XIII All., 324. (2) 80 P. R., 1887.

(2) I. L. R., V All., 274. (4) 74 P. R., 1896.

(5) 58 P. R., 1897.

Privy Council.

No. 84.

Present :

LORD MACNAGHTEN,

LORD ROBERTSON,

SIR ANDREW SCOBLE, AND

SIR ARTHUR WILSON.

RANI BHAGWAN KAUR,—(OBJECTOR),—APPELLANT,

Versus

JOGENDRA CHANDRA BOSE AND OTHERS,—
(PROFOUNDERS),—RESPONDENTS.

APPELLATE SIDE. {

Probate and Administration Act, 1881—Application of, to Sikhs, Brahmos, and unorthodox Hindus—Will—Execution—Blanks in body of will.

Held, by the Privy Council:—

- (i) That a Sikh is included in the term Hindu as used in the Probate and Administration Act of 1881.
- (ii) That a Sikh or Hindu by becoming a Brahmo did not necessarily cease to belong to the community in which he was born.
- (iii) That lapse from orthodox practices in matters of diet and ceremonial observance could not have the effect of excluding a Hindu or a Sikh from the category of Hindu in the Act especially in the case of one who had been born within its purview and who had never become otherwise separated from the religious communion in which he was born.

Found, upon the evidence, that the testator had never become a professed Brahmo, and that the will had been duly executed and that there were no blanks in it at the time of its execution.

Sheo Singh Rai v. Mussammat Dakho ⁽¹⁾, and *Chotay Lal v. Chunno Lal* ⁽²⁾ referred to.

Appeal from a decree of the Chief Court, Punjab (Reid and Chatterji, JJ.) dated 19th April 1900.*

Sir William Rattigan and C. W. Arathoon, for appellant.

J. D. Mayne and W. C. Bonnerjee, for respondents.

The facts of the case are stated in their Lordships' judgment delivered by

5th Aug. 1903.

SIR ARTHUR WILSON.—Sirdar Dyal Singh, a wealthy gentleman who resided at Lahore, died on the 9th September 1898,

⁽¹⁾ *L. R.*, 5 *I. A.* 87; *I. L. R.*, 1 *Al.*, 688.

⁽²⁾ *L. R.*, 6 *I. A.* 15; *I. L. R.*, 14 *Cal.*, 744.

* The judgment is reported as No. 63 P. R., 1900.—*Ed. P. R.*

having executed a will on the 15th June 1895, by which he appointed the respondents his executors, and made various dispositions of his property which need not now be considered. The testator was by birth a Sikh.

On the 18th February 1899 the executors applied to the Chief Court of the Punjab for probate of the will under the Probate and Administration Act (Act V) of 1881. Several persons opposed the grant, amongst whom was the present appellant, the testator's widow. She raised a variety of objections of which it is only necessary to notice two. She alleged, first, that the application was not maintainable under the Act of 1881, as the deceased was not a Hindu within the meaning of the Act at the time of his death or at the time of the making of his will. Secondly, she denied the due execution of the will, and alleged that there were alterations and interlineations which affected the right to probate. Issues were settled raising these questions. The Chief Court decided against the appellant on both points, and granted probate to the executors. Against that decision the present appeal has been brought.

The appellant's first objection resolved itself in argument into three. First, that the testator as a Sikh was not included (in the term "Hindu," as used in the Act of 1881. Secondly, that assuming Sikhs to be Hindus within the meaning of the Act, the testator had before his death ceased to be a Sikh and become a member of the Brahmo Somaj, and so was not a Hindu. Thirdly, that certain personal habits of the testator in respect of diet and otherwise were inconsistent with Hindu or Sikh orthodoxy, and so excluded him from the term Hindu in the Act. Their Lordships will deal with these several points in their order.

A long series of legislative provisions have been enacted for the purpose of securing to the people of India the maintenance of their ancient law, amongst others in matters of inheritance and succession, and many minor enactments have been passed to facilitate the administration of the laws so preserved. The object and principle of this legislation has been throughout to enable the people of various races and creeds in India to live under the law to which they and their fathers had been accustomed, and to which they were bound by so many ties.

The framers of the earlier acts, regulations, and charters had a less detailed acquaintance than we have now with the diversities of creed and of religious law existing in India. They were familiar with two great classes, Muhammadani and Hindus, each

with its own law bound up with its own religion. They thought no doubt that they were sufficiently providing for the case by securing to Muhammadans the Muhammadan Law, and to Hindus (or Gentus, as they were sometimes called) the Hindu Law. In process of time it became more and more clearly understood that there were more forms than one of the Muhammadan Law, and more forms than one of the Hindu Law, and the Courts, acting in the spirit which prompted the legislation, have applied the law of each school to the people whose ancestral law it was. In the same way it came to be known that there were religious bodies in India which had, at various periods and under various circumstances, developed out of, or split off from, the Hindu system, but whose members have nevertheless continued to live under Hindu law. Of these the Jainas and the Sikhs are conspicuous examples. Their cases had to be considered by the Courts, and in dealing with them a liberal construction was always placed upon the enactments by which Muhammadans and Hindus were secured in the enjoyment of their own laws.

As to Jainas the Courts in India always applied the Hindu law generally to their cases in the absence of custom varying that law. This course was approved by this Board in *Sheo Singh Rai v. Mussammatt Dakho* ⁽¹⁾ and *Chotay Lal v. Chunno Lal* ⁽²⁾.

The case of the Sikhs came up for consideration for the first time, so far as their Lordships are aware, before the Supreme Court in Calcutta, in *Doe dem. Kissenchunder Shaw v. Baidam Beebee*, reported briefly from Sir E. Hyde East's notes in 2 Morley's Digest, 22. In the previous volume of the same work (at p. clxxvii) a statement is quoted, made to a Parliamentary Committee in 1830 by Sir E. Hyde East, by whose Court the case just mentioned was decided. He said of that case: "The difficulty was gotten over by considering the Sikhs as a sect of Gentus "or Hindus, of whom they were a dissenting branch."

From that time to the present the same view has been acted upon by the Indian Courts, and particularly (as has been pointed out by the learned Judges of the Chief Court in the present case) by the Courts of the Punjab, which is the real home of the Sikhs.

An ingenious argument was addressed to their Lordships upon this point. It was suggested that the application of Hindu Law to the Sikh community was not based upon their being

⁽¹⁾ L. R., 5 I. A. 87; I. L. R., I All., 698; 2 Calc., L. R., 193.

⁽²⁾ L. R., 6 I. A. 15; I. L. R., IV Calc., 744; 3 Calc., L. R., 465.

Hindus within the meaning of the early legislation bearing on the subject, but upon the alternative rule of justice, equity, and good conscience, also sanctioned by that legislation, in accordance with the principles laid down in *Abraham v. Abraham* ⁽¹⁾, as applicable to converts from Hinduism to Christianity. As to this it seems sufficient to say that the ground of decision has never been that which is now suggested, but that the decisions have been based upon the view that Sikhs were included under the term Hindu.

To recur to the Acts of the Legislature, there have undoubtedly been modern instances in which, in the light of more complete knowledge, the various creeds of India have been more accurately or at least more carefully distinguished than they once were. Their Lordships' attention was called to several instances of this. The Hindu Wills Act, 1870 (No. XXI of 1870), an Act not in force in the Punjab, is made applicable to the will of any Hindu, Jaina, Sikh, or Buddhist. Act III of 1872, passed to provide a form of marriage for persons not professing the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh, or Jaina religion, enumerates those religions accordingly. And the Married Women's Property Act (III of 1874) similarly distinguishes Hindus, Muhammadans, Buddhists, Sikhs, and Jains.

But though in some modern Acts religions are thus distinguished with more detail than was formerly used, in others the old form of language is used, and with the old generality of meaning. An instructive example is to be found in the Punjab Laws Act (Act IV) of 1872, Section 5 of which enacts that in questions regarding succession, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be (a) any special custom applicable to the parties concerned; "(b) the "Muhammadan Law in cases in which the parties are Muhammadans, and the Hindu Law in cases in which the parties are "Hindus." It is impossible to suppose that the Legislature in laying down the law for the Punjab, while providing a rule of decision for Muhammadans and Hindus, should have overlooked the case of the Sikhs, or left them dependant only upon such custom as they might be able to prove. It seems clear that the Legislature used the old phraseology in the old sense, and included Sikhs under the term Hindu.

⁽¹⁾ 9 Moo. I. A., 195.

The evidence in the present case makes it clear, and it is satisfactory to find it so, that in including Sikhs under the term Hindus, Legislators and Judges have acted quite in accordance with popular usage. Witnesses on one side and on the other, Sikhs and others than Sikhs, speak of Sikhs as Hindus. And in an official publication of high authority, the General Report on the Census of India, 1891, at page 164, it is said that a Sikh is "generally called a Hindu in common parlance."

These considerations naturally lead up to an examination of the particular legislative enactments which their Lordships have to construe.

The Indian Succession Act (Act X of 1865) laid down the law as to inheritance and testamentary disposition in British India for all classes of persons who were not exempted from its provisions. The Act is based upon English Law, and for the most part it expresses the rules of that law. It would obviously have been absurd to apply such an Act to the people of India generally, whose laws were wholly different from the English. And accordingly in Section 331 it is declared that—

"The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Muhammadan or Buddhist." Section 332 further gave power to the Government of India to exempt any race, sect, or tribe from the operation of the Act; but no exemption affecting the present question has been made under this section. It appears to their Lordships to be clear that in Section 331 the term Hindu is used in the same wide sense as in earlier enactments, and includes Sikhs. If it be not so, then Sikhs were, and are, in matters of inheritance, governed by the Succession Act, an Act based upon, and in the main embodying, the English Law; and it could not be seriously suggested that such was the intention of the Legislature.

The Probate and Administration Act, 1881 (Act V of that year), which is mainly a procedure Act, commences with a preamble reciting that "it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865, does not apply." In Section 2 it is said that "chapters II to XIII (both inclusive) of this Act shall apply in the case of every Hindu, Muhammadan, Buddhist, and person exempted under Section 332 of the Indian Succession Act, 1865;" and the chapters there mentioned include the provisions for the grant of probate of wills.

Their Lordships think it clear that the term Hindu in this Act is used in the same sense as in the Succession Act, and they agree with the Chief Court in holding that a Sikh is included under that term.

The second form in which the objection to the grant of probate was put was that, assuming the testator as a Sikh to have been originally a Hindu within the meaning of the Probate and Administration Act, he had ceased to be either a Sikh or a Hindu by becoming a member of another religious body, the Brahmo Samaj. The learned Judges of the Chief Court examined the literature bearing upon the Brahmo Society; they had before them much important evidence with reference to the Brahmos and the relation of their principles and their organisation to the Hindu system; and they came to the conclusion that a Sikh or Hindu by becoming a Brahmo did not necessarily cease to belong to the community in which he was born. They also found on the evidence that the testator never became a professed Brahmo at all. In both these conclusions their Lordships agree.

It was next objected that in matters of diet and ceremonial observance the testator had departed so far from the standard of orthodoxy binding upon him as a Hindu or a Sikh as to exclude him from the term Hindu in the Act in question. Their Lordships agree with the learned Judges of the Chief Court in thinking that such lapses from orthodox practice, assuming them to be established, could not have the effect of excluding from the category of Hindu in the Act one who was born within it, and who never became otherwise separated from the religious communion in which he was born.

There remains one further point to be disposed of. It was contended for the appellant that the will admitted to probate had not been duly executed in its present form. The mode in which the objection arose is somewhat peculiar. The will is signed by the testator at the end of it, and attested by two European officers, Dr. Clark, who was at the time the Civil Surgeon, and Colonel Marshall, who was at the time the Divisional and Sessions Judge of Lahore, the attestation clause being in the completest possible form. The will, which is an English document, and which their Lordships have had an opportunity of examining, is also signed at the bottom of each page by the testator and by the attesting witnesses. It was deposited in the office of the Registrar a few days after its execution, and there remained till after the death of the testator more than three

years later. The application for probate fully complied with the requirements of the law as expressed in Sections 62 and 67 of the Probate and Administration Act; it was verified by the executors, and there was appended to it a declaration of due execution by Clark, one of the attesting witnesses. If this had been all, there would have been quite sufficient to warrant the issue of probate. The appellant, however, in opposition to the grant, disputed the due execution of the will, and alleged that there were alterations and interlineations in it which affected the grant of probate. This the executors denied.

At the trial Clark was called as a witness in Court. In examination-in-chief he spoke to the execution of the will with little recollection on the subject, and relying mainly upon his attestation. In cross-examination he said: "I have a vague recollection that the Sardar said something had been omitted which would be filled in afterwards about investments or something of that sort. There is a sort of picture in my mind of a page partly left blank." Further on he said: "My recollection as to the blank page was that it was blank at the bottom. It was not the last page according to my recollection. I noticed it as the pages were being turned over to be signed."

Marshall, the other attesting witness, was examined in England on commission. In chief he spoke pretty clearly to the execution of the will. In cross-examination he said: "To the best of my recollection, a portion of one of the pages, about the middle of the document, was left blank, that is, was not written upon to the foot of the page, as they now all are; and the Sardar gave some explanation as to some details being required. I did not read the will." Question: "By details being required did you not understand that these details would subsequently be filled into the will?" Answer: "I presumed such would be the case. I cannot say to what these details referred. I knew nothing of the contents of the will. I only witnessed the Sardar's signature." (Witness is shown paragraph 25 of the will, page 11, and says with regard to the words "Mrs. L. Catherine Gill" appearing there, that he cannot say whether these words were present when he signed his name at the foot of the page). Question: "Can you state any reasons why the Sardar gave the explanation that there were some details that would be subsequently filled in?" Answer: "Because, as far as I recollect, there was a portion of a page which had not been written upon."

Re-examined he said :—

“I cannot indicate in any way the page of this document which had not been written upon down to the bottom. I cannot say upon looking through the will (as I am not an expert) which paragraphs were written before or after my signatures. I cannot state exactly the length of the blank space. I cannot state what were the number of lines left blank on the unfinished page.”

The impression then upon the minds of these two witnesses is that some one of the pages in the middle of the will was not written on to the bottom. The learned Judges of the Chief Court, dealing with this part of the case, showed that the impression of these witnesses could not be correct, because there is no page of the will in which a sentence ends with the page and in which there could have been such a blank as the witnesses picture to themselves. And for this and other weighty reasons the learned Judges considered that the witnesses must have been mistaken in their impression.

Their Lordships have examined the will for themselves and they entirely concur with the Chief Court in rejecting the suggestion of the supposed blank in the will at the time of its execution.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

No. 85.

Before Mr. Justice Reid.

GANGA BISHEN,—(PLAINTIFF),—APPELLANT,

Versus

MATNA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 118 of 1903.

Oaths Act, 1873—Agent's authority to bind client by oath of opposite party—Power of principal to withdraw after other party has agreed to take the oath.

Held, that an agent holding a power of attorney authorizing him amongst other things “to take all kinds of proceedings in connection with the case” was empowered to bind his principal by the oath of the opposite party under the Indian Oaths Act, and that his principal was not entitled without showing good reasons for retracting it to withdraw the offer made on his behalf after the other party has expressed his willingness to take the oath required.

Mussammat Gharib v. Karim Baksh ⁽¹⁾, *Mussammat Azima Begum v. Muhammad Baksh* ⁽²⁾, *Ram Narain Singh v. Babu Singh* ⁽³⁾, and *Aliaji v. Bala* ⁽⁴⁾, relied upon.

Mussammat Parag Devi v. Ram Chand ⁽⁵⁾, *Amir Chand v. Gobind Sahai* ⁽⁶⁾, *Lekhraj Singh v. Dulhana Kuar* ⁽⁷⁾, and *Sadashiv Raiyaji v. Maruti Vithal* ⁽⁸⁾, referred to.

Miscellaneous further appeal from the order of Sheikh Fakir Ali, District Judge, Rohtak, dated 23rd December 1902.

Shadi Lal, for appellant.

Lajpat Rai, for respondents.

The judgment of the learned Judge was as follows:—

27th June 1903.

REID, J.—The plaintiff-appellant sued for money, was met by a plea of payment, and his attorney offered to be bound by the oath of the defendants to be taken at a certain place.

When the defendants arrived at that place, they were persuaded by friends on the spot that the oath should not be taken and that arbitrators should be appointed.

On returning to Court the appellant's attorney again offered to be bound by the same oath and his offer was accepted by the defendants. Before the oath was taken, the appellant retained a pleader and revoked his attorney's offer, apparently distrusting the defendants.

The Court proceeded to decide the suit on the evidence recorded. In *Mussammat Gharib v. Karim Baksh* ⁽¹⁾ it was held that an attorney empowered "to file any proofs, written or "verbal," was empowered to bind his principal by the oath of the opposite party under Sections 9—11 of the Oaths Act, X of 1873.

The appellant's attorney was specifically empowered as follows:—

1. To appear in Court, to conduct and defend the case, and to take all kinds of proceedings in connection therewith.
2. To effect a compromise with the defendants.
3. To effect a settlement with them.
4. To file a deed of compromise.
7. To refer the suit to arbitration and to nominate arbitrator and umpire.

⁽¹⁾ 72 P. R., 1874.

⁽²⁾ 63 P. R., 1881.

⁽³⁾ I. L. R., XVIII All., 46.

⁽⁴⁾ I. L. R., XXI Eom., 281.

⁽⁵⁾ 75 P. R., 1900.

⁽⁶⁾ 5 P. R., 1903.

⁽⁷⁾ I. L. R., IV All., 302.

⁽⁸⁾ I. L. R., XIV Eom., 455.

On the above authority I have no hesitation in holding that the attorney was empowered to bind his principal by the oath of the defendants.

In *Mussammatt Azima Begum v. Muhammad Baksh* ⁽¹⁾ it was held that a party to a suit, who agrees to be bound by the oath of the other party, cannot at his own pleasure and in the absence of exceptional reasons withdraw after the latter has expressed his willingness to take the oath specified.

Counsel for the appellant cites *Mussammatt Parag Devi v. Ram Chand* ⁽²⁾, and *Amir Chand v. Gobind Sahai* ⁽³⁾, which are so obviously distinguishable that it is unnecessary to specify the distinction: a *dictum* of Oldfield, J., in *Lekhraj Singh v. Dulhama Kuar* ⁽⁴⁾, which I see no reason for preferring to *Mussammatt Azima Begum v. Muhammad Baksh* ⁽¹⁾, *Ram Narain Singh v. Babu Singh* ⁽⁵⁾, in which Oldfield, J.'s *dictum* was dissented from, and it was held that no permission should be accorded to withdraw from an offer which had been accepted, except upon the strongest possible grounds proved to the satisfaction of the Court to be genuine grounds for revoking the proposal, the mere allegation that the opposite party would swear falsely being insufficient; *Sadashiv Raiyaji v. Maruti Vithal* ⁽⁶⁾, in which it was held that an attorney empowered to act in a suit on his principal's behalf in any way in which the principal might act, if present, and to give replies and to receive or take or give copies of papers therein on behalf of the principal, who would be bound by the replies and answers given and the statements made, was not empowered to join in a reference to arbitration or to offer to be bound by the oath of the opposite party. This authority to the attorney is far more limited than the authority under consideration, and the ruling is not, in my opinion, opposed to the conclusion arrived at above as to that authority. *Abaji v. Bala* ⁽⁷⁾, also cited for the appellants, is in accord with *Mussammatt Azima Begum v. Muhammad Baksh* ⁽¹⁾, and *Ram Narain Singh v. Babu Singh* ⁽⁵⁾, and it was held that, if the party who offered to be bound by an oath satisfies the Court that he has good reasons for retracting it, the Court would probably exercise a wise discretion in refusing to administer the oath. No such reasons have been disclosed in the present case. The lower Appellate Court has set aside the decree of the Court of first

(1) 63 P. R., 1881.

(*) I. L. R., IV All., 302.

(2) 75 P. R., 1900.

(5) I. L. R., XVIII All., 46.

(3) 5 P. R., 1903.

(6) I. L. R., XIV Bom., 455.

(7) I. L. R., XXII Bom., 281.

instance and has remanded the suit under Section 562 of the Code of Civil Procedure, in order that the oath may be administered. The question of the administration of the oath was preliminary to the trial of the suit, and I see no reason for interference with the order of remand.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 86.

Before Mr. Justice Reid.

ISHAR SINGH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

LEHNA SINGH,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 48 of 1903.

Custom—Alienation—Will—Sandhu Jats of tahsil Tarn Taran, District Amritsar—Competency of a childless proprietor to make a will in favour of a distant collateral in presence of near collaterals—Burden of proof.

Found.—In a suit the parties to which were Sandhu Jats of tahsil Tarn Taran in the Amritsar District that no custom enabling a sonless proprietor to make a valid disposition of his ancestral property by will in favour of a distant collateral in the presence of near collaterals had been established.

Where the power of transfer by will is not co-extensive with the power of transfer *inter vivos* the onus that a proprietor has a power of alienation by will rests on the person setting up the will.

Rala v. Bana ⁽¹⁾, *Ali Muhammad v. Dullu* ⁽²⁾, *Atma Singh v. Naudh Singh* ⁽³⁾, *Shera v. Saghar* ⁽⁴⁾, *Mukarrab v. Fatta* ⁽⁵⁾, *Shad Ali Khan v. Abdul Ghafur Khan* ⁽⁶⁾, and *Taj I in v. Muhammad Yasin* ⁽⁷⁾, referred to.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Amritsar Division, dated 1st November 1902.

Gurcharn Singh, for appellants.

Harris, for respondent.

The judgment of the learned Judge was as follows :—

27th June 1903.

REID, J.—The question for decision is whether a childless Sandhu Jat of the Tarn Taran tahsil, Amritsar, can, by will, alienate ancestral land to a great-great-grandson of the

⁽¹⁾ 14 P. R., 1901.

⁽²⁾ 26 P. R., 1901.

⁽³⁾ 61 P. R., 1901.

⁽⁴⁾ 83 P. R., 1895.

⁽⁵⁾ 88 P. R., 1895.

⁽⁶⁾ 24 P. R., 1898.

⁽⁷⁾ 99 P. R., 1900.

testator's great-great-grandfather, without the consent of a great-grandson of the testator's great-grandfather, the land having descended from the great-great-grandfather, and the legatee having served the testator for about a year before the death of the latter, cultivating his land and maintaining him in lieu of paying rent. I am satisfied that the legatees served the testator after the plaintiff-respondent, who sought to set aside the will, had refused to serve him, and that he was in need of service: that the document relied on by the defendants-appellants is a will and not a deed of gift, having been executed a year before the testator's death, the evidence on the record satisfying me that until the death of the testator the appellants were tenants only, and mutation as proprietors having been effected in their favour more than a year after the death: and that the land descended to the testator from the great-great-grandfather of the parties.

The *Riwaj-i-am* of 1868 is as follows:—

“ Aur halat lawaldi men agar akarbai jaddi mustahid
“ khidmat na hun to apni jad men se ek shaks mutih wa khid-
“ mat guzari nam bazaria tehrir *bamauryih* bradri hiba karsakta
“ hai, magar farokht karne ka ikhtiar nahin hai.”

In answer to Question XVIII of the Amritsar Customary Law “a few *gôts* of Jats” stated that a childless proprietor might transfer his property to that one of his collaterals who had done him service or tended him in his old age, but that the transfer must be in writing and must not be to a collateral more than four generations distant.

Counsel for the appellants relied on *Rala v. Bana* ⁽¹⁾, *Ali Muhammad v. Dulla* ⁽²⁾, *Atma Singh v. Naudh Singh* ⁽³⁾, Civil Appeal No. 966 of 1900, decided on the 23rd March 1903, dealing with Jats of the Phillour *tahil*, Jullundur, and a suit, decided by the District Judge, Amritsar, on the 24th December 1897, suit No. 70 of 1897, between Jats of the Tarn Taran *tahsil*.

None of these authorities except *Ali Muhammad v. Dulla* ⁽²⁾ deals with alienation by will, and that case was between Awans of Shahpur.

Reliance is also placed on 22 instances among Sandhu Jats compiled in the Court of first instance, including six alienations by will. Of these two only in favour of a brother's son and of a

⁽¹⁾ 14 P. R., 1901. ⁽²⁾ 26 P. R., 1901.

⁽³⁾ 61 P. R., 1901.

great-grandson were contested and were maintained. One of these two was in reward for services rendered, and it does not appear that either was to the detriment of a nearer heir.

Counsel for the respondent cited *Shera v. Saghar* ⁽¹⁾, (Chauhans of Jhelum); *Mukarrab v. Fatta* ⁽²⁾ (Awans of Jhelum); *Shad Ali Khan v. Abdul Ghafur Khan* ⁽³⁾, (Pathans of Peshawar), in which it was held that it does not follow that a proprietor, who has by custom plenary power of alienation *inter vivos*, has a power of alienation by will, and that the latter power must be proved by the party setting up the will.

Taj Din v. Muhammad Yasin ⁽⁴⁾, which has no application except in so far as it lays down that (in a pre-emption suit) the *Rivaj-i-am* of a tahsil is without application unless supported by instances in the village. This is a recognized principle which does not require authority. Two of the alienations by will cited in the present case, in favour of a daughter's son and of a step-son, both uncontested, were from a village bearing the name of the village in suit.

In spite of the tendency of recent rulings to give effect to wills the power of transfer by will is not, in my opinion, in the tribe to which the parties to this suit belong, co-extensive with the power of transfer *inter vivos*, and the burden rests on the person setting up the will.

The instances cited are, in my opinion, insufficient for the discharge of the burden of proving the existence of the custom set out above.

Counsel for the appellants, the day before the hearing, took an additional ground of appeal, that the respondent was not entitled to possession until he refunded the sum expended by the appellants on the funeral of the last owner. This sum was alleged to be Rs. 50. The addition of this ground at so late a stage was objected to, and having regard to the fact that the appellants were in possession of the property in suit for about a year between the death of the last owner and suit, to the trivial amount of the sum claimed, and to the delay in taking the additional ground, the objection was allowed.

This appeal fails and is dismissed, with the exception that, under the circumstances, the parties will bear their own costs of all Courts.

Appeal dismissed.

⁽¹⁾ 83 P. R., 1895.

⁽³⁾ 24 P. R., 1898.

⁽²⁾ 88 P. R., 1895.

⁽⁴⁾ 99 P. R., 1900.

No. 87.

Before Mr. Justice Reid.

MUSSAMMAT BADSHAH AND ANOTHER,—

(DEFENDANTS),— APPELLANTS,

Versus

SAHIB AND OTHERS,—(PLAINTIFFS),— RESPONDENTS.

Civil Appeal No. 551 of 1901.

} APPELLATE SIDE.

Civil Procedure Code, 1882, Section 43—Suit to include whole claim—Discretion of plaintiff having several causes of action to sue in respect of one only—Subsequent suit in respect of another cause of action not barred.

The defendants had a sister F, on whose marriage they took possession of her share in the property, and mortgaged the whole, including their own joint property, to one S. Thereupon the plaintiff No. 1 and the father of plaintiff No. 2 instituted a suit against the present defendants and S, claiming possession of one-third of the property mortgaged on the allegation that they were F's reversioners, and in respect of the remaining two-thirds a declaration that the alienation would not affect their reversionary rights, and obtained a decree for the relief sought. Subsequently they instituted the present suit against the two sisters alone for possession of the residue of F's land. It was pleaded that the present suit was barred by Section 43, Civil Procedure Code, by reason of the previous suit.

Held, that Section 43 was not applicable and did not bar the present suit. The fact that a suit embracing the relief sought in the present suit and in the former suit might not have been bad for misjoinder did not necessarily entail that the present suit was barred by reason of the relief claimed not having been included in the former suit, and that although the respondent's right to possession of the share of F had accrued when the previous suit was instituted, the immediate cause of action was the execution of the mortgage, and the plaintiffs were entitled to sue separately for the relief claimed, which had no connection with the mortgage.

Rao Kurun Singh v. Nawab Mahomed Fyz Ali Khan ⁽¹⁾, *Kristodass Kundoo v. Ramkant Roy Chowdhry* ⁽²⁾, *Ittappan v. Manavikrama* ⁽³⁾, *Chuhar Mul v. Mussammat Bakatvaddi* ⁽⁴⁾, *Mussammat Rattan Kaur v. Badna* ⁽⁵⁾, and *Ishan Chunder Hazra v. Rameshwar Mondol* ⁽⁶⁾ referred to.

Miscellaneous further appeal from the order of T. J. Kennedy, Esquire, Divisional Judge, Rawalpindi Division, dated 8th April 1901.

Sukh Dial, for appellants.

S. Lall, for respondents.

⁽¹⁾ 14 Moo. I. A., 187.⁽²⁾ 149 P. R., 1890.⁽³⁾ I. L. R., VI Cal., 142.⁽⁴⁾ 24 P. R., 1899.⁽⁵⁾ I. L. R., XXI Mad., 163.⁽⁶⁾ I. L. R., XXIV Cal., 831.

At a preliminary hearing of the appeal in Chambers the following order was recorded by

25th Jan, 1903.

REID, J.—The plea that the suit is barred is based on a suit instituted on the 26th August 1892 by the present plaintiff and the father of plaintiff 2 for possession of the share of Mussammat Fatta, who had married, in land mortgaged by her sisters, and for a declaration that the mortgage, then in suit, would not affect the reversionary rights of the plaintiffs in the estate of the mortgagors. A decree was passed for the relief sought, *i.e.*, possession of one-third of 145 *kanals* 2 *marlas*, and a declaration as to the remaining two-thirds. The present suit is against the sisters only for possession of the residue of Mussammat Fatta's land, the mortgagee having been impleaded with the sisters as a defendant in the prior suit.

The plaintiff's allegation in the former suit was that the mortgagors had taken possession of the whole of Mussammat Fatta's estate, and that mutation of names in respect thereof had been effected in their favour on the 31st May 1891. *Rao Kurun Singh v. Nawab Mahomed Fyz Ali Khan and others* ⁽¹⁾, *Kristodass Kundoo v. Ramkant Roy, Chowdhry* ⁽²⁾, *Ittappan v. Manavikrama* ⁽³⁾, cited by the lower Appellate Court, are not on all fours with the present case. Under the rules laid down in *Chuhar Mal v. Mussammat Bakhtwaddi and others* ⁽⁴⁾ and *Mussammat Rattan Kaur v. Badna* ⁽⁵⁾, cited by the pleader for the appellants, the previous suit would not have been bad for misjoinder had the then plaintiff claimed the whole estate of Mussammat Fatta.

If the cause of action was the appropriation by the appellants of that estate, apparently before the execution of the mortgage, executed on the 25th July 1892, the whole estate could have been recovered in that suit, the mortgagee being impleaded as a trespasser. If the cause of action was the execution of the mortgage deed, Section 43 does not bar the present suit. Admitted for argument, Single Bench.

The final judgment of the Chief Court was delivered by

30th June 1903.

REID, J.—My order of the 25th January 1902, admitting this appeal, will be read with this.

⁽¹⁾ 14 Moo. I. A., 187.

⁽²⁾ I. L. R., VI Calc., 142.

⁽³⁾ I. L. R., XXI Mad., 153.

⁽⁴⁾ 149 P. R., 1890.

⁽⁵⁾ 24 P. R., 1899.

The pleader for the appellants cited *Chuhar Mal v. Mussammat Bakhtwaddi and others* ⁽¹⁾, *Mussammat Rattan Kaur v. Badna* ⁽²⁾, and an unreported ruling of this Court, Further Appeal 142 of 1899, which follows it: *Ishan Chunder Hazra v. Rameswar Mondol* ⁽³⁾, *Ittappan v. Manavikroma* ⁽⁴⁾.

At page 156 of the report of the last cited case the rule is laid down thus by Sheppard, J.: "It is quite clear that in applying Section 43 of the Code, it has first to be seen whether the cause of action alleged in the plaint is identical with the cause of action alleged in the former suit, and that by the term *cause of action*, must be understood all the circumstances alleged by the plaintiff to exist, which, if proved or admitted, will entitle him to the relief prayed for. The class of cases to which Section 43 is intended to apply is indicated by the illustration. Where there has been an infringement of one right and one cause of action has arisen, the plaintiff must make his whole claim once for all in one suit."

Not one of the authorities cited is on all fours with the present suit, and the fact that a suit, embracing the relief sought in the present suit and in the former suit, might not have been bad for misjoinder, does not, in my opinion, necessarily entail that the present suit is barred by reason of the relief now claimed, not having been included in the former suit. Although the respondents' right to possession of the share of Mussammat Fatta had accrued when the previous suit was instituted, the immediate cause of action was the execution of the mortgage and the respondents were, in my opinion, entitled to sue separately for the relief now claimed, which has no concern with the mortgage, although the trespass by the sisters of Mussammat Fatta was a denial of the respondents' rights just as the mortgage was. The mortgage was not in itself a denial of the respondents' rights to property not mortgaged, and, although both denials might possibly have been made the subject of one suit, the respondents claimed in the previous suit all that they were entitled to claim on the cause of action afforded by the mortgage.

For these reasons the present suit is not barred by the provisions of Section 43 of the Code of Civil Procedure. The appeal fails and is dismissed with costs. Counsel's fee Rs. 16.

Appeal dismissed.

⁽¹⁾ 149 P. R., 1890.
⁽²⁾ 24 P. R., 1899.

⁽³⁾ I. L. R. XXIV Cal., 831.
⁽⁴⁾ I. L. R., XXI Mad., 153.

No. 88.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

SHER SINGH,—(DEFENDANT),—PETITIONER,

Versus

THAKAR DAS AND ANOTHER,—(PLAINTIFFS),—
RESPONDENTS.

Civil Miscellaneous No. 88 of 1903.

Transfer of suits—Disqualification of presiding Judge—Reasonable apprehension of bias.

In dealing with applications for transfer of cases under Section 25 of the Civil Procedure Code in which there is no question of personal interest the superior Court should require the applicant to show that his apprehension is reasonable, i.e., such as a man of a sound sense would regard as legitimately raising the inference of bias, but where the acts of the presiding Judge complained of were colourless and innocent and raised no presumption one way or the other in respect of his mental attitude about the case the apprehension must be held unreasonable.

Serjeant v. Dale ⁽¹⁾ cited.

Girish Chunder Ghose v. Queen-Empress ⁽²⁾, *In re Pandurang Gobind Pujari* ⁽³⁾, *Dupeyron v. Driver* ⁽⁴⁾, *Fazand Ali v. Hanuman Prasad* ⁽⁵⁾, and *The Legal Remembrancer v. Bhairab Chandra Chakerbutty* ⁽⁶⁾ referred to.

Petition for transfer of a civil appeal from the Court of Additional Divisional Judge, Gujrat, to Divisional Judge, Jhelum.

Nanak Chand, for petitioner.

Ganpat Rai, for respondents.

The judgment of the Court was delivered by—

31st July 1903.

CHATTERJI, J.—This is an application for the transfer of an appeal pending in the Court of Mr. Joti Parshad, District Judge of Gujrat, invested with the powers of an Additional Divisional Judge, in respect of certain classes of appeals from that Court to that of the Divisional Judge of Jhelum. The grounds are that Rai Bahadurs Ganga Ram and Dilbagh Rai, retired Extra Assistant Commissioners, who are Honorary Magistrates and first class Munsifs at Kunjah, were witnesses in the case for the plaintiff-appellant; that when the evidence of the former was being taken by a commissioner, the petitioner, who is the defendant-respondent in the appeal, was abused by him; that on

⁽¹⁾ L. R., 2 Q. B. D., 558.

⁽²⁾ I. L. R., XX Cal., 857.

⁽³⁾ 2 Bom., L. R., 755.

⁽⁴⁾ I. L. R., XXIII Cal., 495

⁽⁵⁾ I. L. R., XIX All., 64.

⁽⁶⁾ I. L. R., XXV Cal., 727.

the 15th March last Mr. Joti Parshad went to Kunjah and became the guest of Rai Bahadur Ganga Ram ; that at his house he received the plaintiffs' appeal, inspected the disputed property and issued notice without calling for the record ; that Rai Bahadurs Ganga Ram and Dilbagh Rai are interesting themselves in the plaintiffs' favour, and that petitioner is, therefore, afraid that the District Judge, who is their friend, might not do him justice.

The District Judge was asked to offer his observations on the above allegations, which were supported by affidavit, and reports that he went to Kunjah to inspect the Courts of the two gentlemen above named, who are Munsifs and subordinate to him ; that he stopped in the Court-house where Rai Bahadur Ganga Ram holds his Court and held his own Court there on the 16th and received the appeal in the ordinary course, and, according to the prayer of the appellant and after notice to the respondent, visited the spot in the presence of the parties ; that he issued notice to the respondent without seeing the files in accordance with his usual practice, and fixed a date, in April, for the hearing ; that he was asked to dinner by both the gentlemen and accepted their invitations as a matter of common courtesy between gentlemen ; that he has no knowledge about their relations with the plaintiff, and has never been spoken to at all about the case by either of them, and that he knows them only as much as he knows other officers in the district in his official capacity.

It is clear, therefore, that the only point worth consideration that is made out with reference to this application is that the District Judge, when he visited Kunjah, accepted the invitations of Messrs. Ganga Ram and Dilbagh Rai to dine with them. He stopped in the house in which one of them usually holds his Court and held his Court there. He received the appeal in the ordinary course and visited the spot in the presence of the parties after notice to the defendant. We see nothing in these acts tainted with the least impropriety. The District Judge also could not know beforehand that the petitioner had a grievance against the Honorary Munsifs of Kunjah and had no reason to decline their invitations to dinner, which, without good reasons on his part, would have been discourteous. They did not intercede with the District Judge for the plaintiff-appellant, and, knowing the positions these gentlemen held in Government service, we can hardly believe without reliable and positive proof, that they would be guilty of such grave misconduct. The receiving of the appeal at Kunjah and the inspection of the

spot were ordinary official acts, with which there is no reason to find fault. The defendant has chosen to build a theory of bias from these facts, but they are perfectly natural and do not lend support to any such inference.

The District Judge acted quite innocently, in ignorance of the defendant's feelings towards these gentlemen, for he could not know that such an appeal was to be instituted before him. Nor did he know any of its facts, as he points out, for the record was not before him. The matter might have worn a different complexion had the District Judge indulged in these social amenities after receiving the appeal and knowing its facts, and the connection which these gentlemen are said to have with the case and the defendant's strained relations with Rai Bahadur Ganga Ram.

Of the authorities cited before us, *Serjeant v. Dale* ⁽¹⁾ is a case relating to personal interest. The Bishop of London, who had initiated proceedings under the Public Worship Act, 37 and 38 Vict., C. 85, against the petitioner, was patron of the benefices of which the latter was the rector, and the Court granted a prohibition on this ground. Mr. Justice Lush, in delivering the judgment of the Court, observed: "The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security." *Girish Chunder Ghose v. Queen-Empress* ⁽²⁾, is a case, which, *inter alia*, was considered to fall within the prohibition by reason of "personal interest" contained in Section 555, Criminal Procedure Code, the District Magistrate from whose Court the transfer was sought having personally taken an active part in dispersing an unlawful assembly and pursued and directed the pursuit of the members thereof and subsequently taken pains to collect evidence showing the connection of the accused with the unlawful assembly and initiated and directed their prosecution. These cases have special features of their own in regard to

(1) *L. R.* 2 Q., B. D., 558.

(2) *I L. R.*, XX Calc., 857.

which the law contains express provisions, and the disqualification of the Judges therein arose from circumstances apart from anything done by them in the proceedings of the cases initiated or tried by them. The principle enunciated by Mr. Justice Lush in *Serjeant v. Dal*, however, is a valuable one, and can with advantage be applied to cases in which there is no question of personal interest. In *re Pandurang Gobind Pujari* ⁽¹⁾ is also a case in which the disqualification alleged was of this character. *Dupeyron v. Driver* ⁽²⁾ and *Farzand Ali v. Hanuman Prasad* ⁽³⁾ are cases under the transfer section of the Code of Criminal Procedure, in which, by reason of certain acts or conduct of the Magistrates trying them, transfers were allowed from their Courts, and the principle in question was quoted with approval; see also *The Legal Remembrancer v. Bhairab Chandra Chakraborty* ⁽⁴⁾.

In the present instance the acts of the District Judge with reference to the appeal are colourless and innocent, and raise no presumption one way or the other in respect of his mental attitude about the merits of the case. The record was not before him. He received the appeal sitting in open Court and visited the spot in the presence of the parties. What bearing the visit would have on the case is yet unknown. Even if it was useless with reference to the merits, no wrong motive can be attributed to the Judge, if for the sake of convenience, happening to be at Kunjah, he saw the locality and left its hearing for future consideration. We have already adverted to his acts outside the appeal, on which the application is partly based, and shown them to have been both innocuous and practically unavoidable.

Under these circumstances we do not see how this case can be brought within the purview of the principle laid down in the authorities. It is not every apprehension of the litigant that the superior Court has to take into consideration under the rule. The apprehension must be reasonable, i.e., such as a man of sound sense would regard as legitimately raising the inference of bias. We cannot order a transfer merely because the party applying for it chooses to make unfounded allegations and to misconstrue the most innocent acts of the presiding Judge into indications of bias. To pay regard to the idiosyncracies of litigants in this way would place Judicial Officers at their mercy and lead to obstruction of public business. It would also promote

⁽¹⁾ 2 Bom., L. R., 755.

⁽³⁾ I. L. R., XIX All., 64.

⁽²⁾ I. L. R., XXIII Calc., 495.

⁽⁴⁾ I L. R., XXV Calc., 727.

the filing of unfounded and malicious applications. No man has a right to choose his own tribunal or to object to his case being tried in the Court which the law provides for it, unless for good cause. A Judicial Officer is bound to be circumspect in his dealings generally, and so to act in relation to cases coming before him as not to give rise to suspicion against his honesty or fairness, but he cannot be expected to cease to be a member of society or to act as such in his private life.

We, therefore, consider that no substantial cause has been made out for a transfer in this case. We are asked by counsel to grant it because the very making of the application is likely to prejudice the District Judge against the petitioner. We cannot accede to this argument, for in that case it would be in the power of every litigant to get a transfer at his pleasure by making an application aspersing the character of the Judge, and then representing that after making those aspersions he could not hope for justice at his hands. Thus every application would be bound to succeed, which is a *reductio ad absurdum*. Moreover, we do not think in the present instance any serious allegations have been made against the character or impartiality of the Judge, and the application is more foolish than malicious. It would be casting an unmerited slur upon the judicial integrity of an officer of Mr. Joti Parshad's standing to hold that he would be unable to dispense impartial justice in this case because of the practically harmless allegations made in the petition of transfer.

We reject the application with costs.

Application dismissed.

No. 89.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

SUNDAR SINGH AND ANOTHER, — (DEFENDANTS), —
APPELLANTS,

Versus

NATHA, — (PLAINTIFF), — RESPONDENT.

Civil Reference No. 7 of 1903.

Mortgage—Mortgage of common holding—Part of mortgaged land already heavily encumbered—Remedies of mortgagee.

A being in possession of a part of the common holding mortgaged certain specific portions out of it to B.

Subsequently the mortgagee being deprived of his security on account of the mortgagor's title being defective and the existence of a prior

REFERENCE SIDE, {

mortgage, claimed to have his security made good out of the remainder of the common land forming part of the mortgagor's share.

Held, that as the mortgagee was deprived of his security by the wrongful act of the mortgagor, he was entitled to have his security made good to him out of the common holding in possession of the mortgagor.

Byjnath Lal v. Ramoo-deen Chowdry ⁽¹⁾, *Bel Ram v. Mussammat Shahzada Begam* ⁽²⁾, *Ajij-ud-din Sahib v. Sheikh Budan Sahib* ⁽³⁾, and *Babu Rai v. Nathu* ⁽⁴⁾ referred to.

*Case referred by C. L. Dundas, Esquire, Divisional Judge,
Hoshiarpur Division, on 12th May 1903.*

The material facts of this case and the question referred for the opinion of the Chief Court appears from the following judgment of the learned Divisional Judge :—

The defendants, Sundar Singh and Indar Singh, mortgaged 16 *kanals* of land with possession to Natha on 31st May 1897. *Khasra* 2623.

The mortgage deed recites that the land is *shamilat deh*, but in the occupancy and possession of the mortgagors. *Maurusa mukbuza*.

The mortgagors further undertake to be responsible in every way *har tarah* for any damage of any description incurred by the mortgagee.

It subsequently appeared that half was in the right of Ala Singh, uncle of the defendants, to whom it was only mortgaged. Ala Singh got a decree for possession in 1899.

Another quarter was secured by Kishen Singh, a prior mortgagee in 1900, and the remainder has admittedly passed out of Natha's possession, though whether the defendants or Kishen Singh has got it is doubtful.

The plaintiff, Natha, sued to have his security made up from neighbouring land on which the defendants have similar rights to those they alleged in the deed of mortgage.

He objects to a money decree on the ground that it would be extremely difficult to realise anything from the defendants.

The Honorary Sub-Judge has given him a decree for possession of 16 *kanals* of neighbouring land in the possession of the defendants, this land being also *shamilat deh*.

The latter appeal.

The point involved is one of some difficulty. *Babu Rai v. Nathu and others* ⁽⁴⁾ is quoted for the appellants. I would note, however, that in the leading case *Byjnath Lal v. Ramoo-deen Chowdry* ⁽¹⁾, it was distinctly laid down by the Privy Council that in a case of a fair partition, a mortgagee of part, or the whole of an undivided share would be obliged to content himself with such share as it emerged transformed by partition

⁽¹⁾ 21 W. R., 233.

⁽²⁾ 101 P. R., 1894.

⁽³⁾ I. L. R., XVIII Mad., 492.

⁽⁴⁾ 32 P. R., 1900.

as his security without regard to the particular plots specified in his mortgage.

The obligation is however mutual, *i.e.*, a mortgagor is, on partition, bound to make up to the mortgagee, an area out of what comes to him equivalent to any area specifically mortgaged of which the mortgagee is on partition dispossessed. *Beli Ram v. Mussammat Shahzada Begam* ⁽¹⁾.

It is clear that the mortgage of specific plots in undivided property is held to be equivalent to the mortgage of a fraction of the undivided share.

On this principle had there been a partition in this case, and the mortgagee been dispossessed by a fair partition, the defendants-mortgagors would have been bound to make good the area from any share that came to them.

However, there has been no partition, but the defendants have committed a wrongful act or default by which the mortgagee has been deprived of possession.

Under the Transfer of Property Act, 1868, the mortgagee is entitled to sue for his money.

In that section, under circumstances where there is no such wrongful act or default, the mortgagor is entitled to make good the security from other similar property, but this appears to be a concession to the mortgagor, as in default the mortgagee can realise his money.

The Transfer of Property Act is not in force in the Punjab, and the question arises whether when the dispossession of the mortgagee is caused not by a just and lawful partition, but by the wrongful act of the mortgagor, is the mortgagee thereby placed in a worse position.

In Ghose's Law of Mortgage, page 347, is noted: "A mortgagee has of course a much stronger equity if any fraud has been practised for the purpose of depriving him of his security."

The words are somewhat vague and the instances given appear to refer to fraud subsequent to the mortgage, and not to a fraud in the actual execution.

It would certainly appear that the mortgagor should make up the security elsewhere, and not compel the mortgagee to accept a useless money decree.

But *Babu Rai v. Nathu* ⁽²⁾, undoubtedly throws much uncertainty on the point, it being there clearly laid down that a mortgagee would not be entitled on failure of his security to have it made good from other land that had subsequent to the mortgage come into the mortgagor's possession.

It is not, however, quite clear how far the element of time comes in and the decision is in apparent conflict with *Ajij-ud-din Sahib v. Sheikh Budan Sahib* ⁽³⁾.

(1) 101 P. R., 1894. (2) 32 P. R., 1900.

(3) I. L. R., XVIII Mad., 492.

As there seems so much doubt, I refer the following point under Section 617, Civil Procedure Code, for the decision of the Chief Court :—

“ Whether a mortgagee dispossessed of his security by the wrongful act of the mortgagor is entitled to have his security made up from other similar property of the mortgagor or is only able to sue for his mortgage money ? ”

The judgment of the Chief Court was delivered by

ROBERTSON, J.—The facts upon which the reference is made are fully set forth in the order of reference, and we will not recapitulate them here. 15th Aug. 1903.

The land originally mortgaged was, we understand, part of the *shamilat deh*, and the land out of which plaintiff seeks to make good his security is also *shamilat deh*, and belonged to the mortgagor at the time the mortgage was executed. We are not aware of any ruling that lays down the broad principle that when a mortgagor has mortgaged certain specific land, and it is subsequently found that there is a defect in the security, that the mortgagee is entitled to make up his security out of any other land elsewhere which the mortgagor may possess. Such a proceeding may appear at first sight equitable, but we know of no ruling which lays it down in those broad terms, and we must point out that the Court making this reference appears to be under some misapprehension as to what has been ruled in the various judgments quoted, which are not in any way in conflict.

In *Byjnoth Lal v. Rimocdeen Chowdry* ⁽¹⁾, it was held by the Privy Council that when certain land mortgaged out of a common holding, passes away from the mortgagor at partition, the mortgagee has a right, and a right only, against the land allotted to the mortgagor on partition. The same principle is enunciated in *Beli Ram v. Mussammatt Shohzad Began* ⁽²⁾.

In *Ajij-ud-din Sahib v. Sheikh Budan Sahib* ⁽³⁾, it was held that when the whole of a certain plot of land had been mortgaged by a person not at the time of the mortgage really possessed of all the land, and other shares in it subsequently fell to the mortgagor by inheritance, the mortgagee was entitled to proceed against the land originally mortgaged without title, to which the mortgagor's title had subsequently been made good, as well as against that to which the mortgagor's title was already good when it was mortgaged.

⁽¹⁾ 21 W. R., 233.

⁽²⁾ 101 P. R., 1894.

⁽³⁾ I. L. R., XVII Mad., 492.

The decision in *Babu Rai v. Nathu* ⁽¹⁾ does not differ in any way from any of these rulings. In that case it was held that a mortgagee could not claim to substitute land which the mortgage-deed *did not purport to mortgage* and which *was not in the possession of and did not belong to the mortgagor at the time of the mortgage*, but which came to the mortgagor afterwards by inheritance, for the land actually mortgaged, when that land was found to be already encumbered with another charge. This judgment is not in conflict with any of the others quoted.

Here what is mortgaged is part of a common holding, specific portions in the mortgagor's possession being given security. Had these portions been taken from the mortgagor on partition, clearly the mortgagee would have been entitled to proceed against the portions allotted to the mortgagor in lieu of those of which he was deprived. Here partition has not yet taken place, but the land claimed as security is also part of the mortgagor's share at the time the mortgage was made. What, therefore, was really mortgaged was a certain area out of a common holding, which specific portion the mortgagor could not be absolutely certain of retaining at partition, and we think the mortgagee is entitled, when one portion of that common holding allotted to him, is found to be already heavily encumbered, to claim to have his security made good out of the remainder of the common holding forming part of the mortgagor's share. Even then of course the mortgagee will have no absolute claim to the specific land, which might or might not fall to the mortgagor at partition, but might have to proceed against land allotted at partition in lieu thereof. We think, however, that he is entitled to such security as can be made good to him out of the common holding.

No. 90.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

MUL SINGH,—(DEFENDANT),—APPELLANT,

Versus

KHANU AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 848 of 1900.

Custom—Alienation—Alienation by daughter—Necessity—Suit by reversioners to set aside alienation by daughter.

Found in a suit the parties to which were governed by the Punjab Customary Law that an alienation by a daughter holding land

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⁽¹⁾ 32 P. R., 1900.

until her marriage for necessity was valid against the customary heirs.

As a general rule a daughter's tenure of her father's land until death or marriage is very analogous to that of a widow in her husband's property.

Further appeal from the decree of Rai Bahadur Lola Buta Mal, Additional Divisional Judge, Jhelum Division, dated 19th February 1900.

The judgment of the Court was delivered by

CHATTERJI, J.—The facts are sufficiently stated in the judgments of the lower Courts. This was a sale by a daughter holding land until her marriage for alleged necessary debts. 13th Aug. 1903.

Both the lower Courts are agreed that the debts were all for valid and necessary purposes, but the Divisional Judge, on the ground that the daughter could not alienate beyond the term of her own interest, has granted the plaintiff a decree for possession on payment of the consideration money for the sale, *viz.*, Rs. 488-3-0. The vendee has appealed against this, while the plaintiffs have filed cross-objections against the finding that all the items making up the purchase-money were incurred for necessity.

We have examined the record on the last point carefully, and find that there is a large item of Rs. 256-11-0, for which the vendee had obtained a decree. In the suit Bahbal, plaintiff, was a party and the decree is not seriously challenged by him. The other large item Rs. 156-8-0 consists of a book account with some interest. It is made up mostly of small sums on account of grain, seed and revenue, and one item of Rs. 44 on account of a he-buffalo. The items appear to be proper and have been held to have been actually advanced. We see no reason to disallow this account. It is shown, as remarked by the first Court, that produce of the land was not good and often failed to cover the expense of cultivation and the revenue charges. The plaintiffs themselves are in debt for this reason. In addition to the above there are three sums, *viz.*, Rs. 23 for revenue, Rs. 12 costs of the registered deed, Rs. 40 paid in cash at registration, which partly covered the expenses of the woman's marriage. They all appear to be legitimate charges. The plaintiff's cross-objections, therefore, fail.

As regards the defendant's appeal, we think on the whole that the sale should be upheld. The purchase-money consists of

necessary debts, and under the circumstances the daughter presumably had the right to sell, if she acted in good faith. There is no proof that she acted otherwise, and the daughter's tenure of her father's land until death or marriage, is very analogous to that of the widow in her husband's property until death or re-marriage. All females inheriting land presumably hold on a tenure similar to that of the widow. The widow could sell under the circumstances disclosed and the daughter presumably could do so. There is no proof of any custom to the contrary, and we see no adequate reason to order an inquiry at this stage. We hold, therefore, that the sale was a proper one and with authority and should be upheld.

We accept the appeal and restore the decree of the first Court with all subsequent costs.

Appeal allowed.

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No. 91.

Before Mr. Justice Anderson.

BODH RAJ,—(PLAINTIFF),—APPELLANT,

Versus

FAIZ BAKHSI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 487 of 1902.

Punjab Alienation of Land Act, 1900, Section 9—Mortgage—Possession—Suit for possession under the terms of a mortgage deed containing clauses intended to operate by way of conditional sale—Duty of Civil Court under Section 9 (3) of the Alienation of Land Act.

Held, that notwithstanding the fact that a mortgagee holding a deed containing a condition intended to operate by way of conditional sale sues for possession only, the Civil Courts are bound in the first instance to refer the case to the Deputy Commissioner under the provisions of subsection 3 of Section 9 of the Punjab Alienation of Land Act, and should not grant him the relief asked for although he may be willing to surrender and agree, of his own motion, to have the condition for sale struck out.

Narain Singh v. Hayat (1) referred to.

Further appeal from the order of T. J. Kennedy, Esquire, Divisional Judge, Rawalpindi Division, dated 1st April 1902.

Ishwar Das, for appellant.

Dharm Das, for respondents.

The judgment of the learned Judge was as follows:—

ANDERSON, J.—This was a case in which a mortgagee's assignee holding a deed containing a condition for sale has sued for possession only. The point as to which parties are at issue is whether the Civil Court was or was not bound, under the circumstances, to refer the case to the Deputy Commissioner under the provisions of Section 9, sub-section 3, of the Punjab Alienation of Land Act.

17th Nov. 1903.

Both parties rely on *Norain Singh v. Hayat* ⁽¹⁾, but appellant contends that, on page 61 of that reference, it was held *obiter* that, in such cases, *viz.*, where the plaintiff not only does not sue on the clause regarding conditional sale, but surrenders that condition altogether and agrees, of his own motion, to have it struck out, the mortgage would cease to be one including such a clause and the reference to the Deputy Commissioner would be no longer necessary, as there would be no mortgage before the Courts coming within the purview of Section 9 (2). The circumstances of the present case are so far similar to those of the case referred to, plaintiff being a Khatri banker and defendants *bonâ fide* agriculturists.

In the present case Mr. Ishwar Das states that his client gives up the condition as regards sale on failure to satisfy the mortgage, and thus far again the cases are similar. But, in the same ruling, the Bench explicitly laid down that the provisions of Section 9 (2) (3) are to be regarded as imperative and that, if a reference to the Deputy Commissioner be necessary, and, if in the exercise of his power under the Land Alienation Act, the Deputy Commissioner do not dispose of the case (*i.e.*, I apprehend, if the Deputy Commissioner consider that he should not intervene), he should be requested to return the record after discharging his duties in connection therewith.

Now Section 9 (2) provides that the Deputy Commissioner may put the mortgagee to his election whether he will accept in lieu of the mortgage by way of conditional sale a mortgage in form (a) or (b) as permitted by Section 6, which shall be made for such period not exceeding the period permitted by the said section and for such sum of money as the Deputy Commissioner considers to be reasonable. The period permitted by the section is twenty years. The Divisional Judge's view in the present case is that the plaintiff, who represents the original mortgagee, should

(1) 20 P. R., 1903.

not be allowed to take over possession from defendant, the pre-emptor, who now represents the original mortgagor, without allowing the Deputy Commissioner, should he think fit, to limit the term of his possession to twenty years, whether the amount charged on the land be or be not repaid within that period.

This appears to me to be the proper course to pursue, and I am not prepared to hold that anything to the contrary is laid down in *Narain Singh v. Hayat* ⁽¹⁾ by the dictum on page 61. Sub-section 1 of Section 9 of the Act apparently covers the case of a mortgage made in a form not permitted by the Act, and gives the Deputy Commissioner full power to interfere. Being thus advised, I would decline to interfere and dismiss the appeal and maintain the Divisional Judge's order. Under the circumstances each party will bear his own costs in this Court.

Appeal dismissed.

No. 92.

Before Mr. Justice Chatterji and Mr. Justice Anderson.

SITA RAM, —(DEFENDANT),—APPELLANT,

Versus

DHANI RAM AND OTHERS, —(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 830 of 1900.

Appeal—Arbitration—Decree in accordance with an award—Revision—Civil Procedure Code, 1882, Sections 522, 622.

Held, that an appeal does not lie from a decree passed upon a judgment given according to an award except in so far as the decree may be in excess of or not in accordance with the award.

Held, also, that the omission of a Court to remit an award which determines matters not referred to arbitration is not subject to revision, and, although a revision lies against a decree based upon an arbitration award on the ground of material irregularity, yet that material irregularity must have reference to the proceedings of the lower Court and not to those of the arbitrator.

Panna Lal v. Mussamat Soman ⁽²⁾, *Choochur Singh v. Jeet Singh* ⁽³⁾, and *Ghulam Jilani, &c., v. Muhammad Hassan* ⁽⁴⁾ cited.

First appeal from the decree of Lala Ram Nath, District Judge, Amritsar, dated 7th July 1900.

Beechey, Gurcharan Singh and Dhanraj Shah, for appellant.
Lal Chand, for respondents.

⁽¹⁾ 20 P. R., 1903.

⁽²⁾ 89 P. R., 1902, F. B.

⁽³⁾ 64 P. R., 1870, F. B.

⁽⁴⁾ 25 P. R., 1902.

The judgment of the Court was delivered by :—

CHATTERJI, J.—We have heard counsel for the appellant at length and are of opinion that the appeal must fail except as to a small part of the lower Court's decree in regard to which there is a technical flaw. It is that the provision absolving defendant from liability from the maintenance and marriage of Gulzari's widow and daughter, respectively, and throwing it on the plaintiff, has been omitted from the decree. To this extent, and to this extent only, does an appeal lie to this Court. Mr. Beechey contends that the right of appeal being established under Section 522, Civil Procedure Code, the whole case can be opened up by appellant, but we do not agree in this view. The wording of Section 522 is very clear and stringent and forbids an appeal except in so far as the decree does not correspond with the award. We accordingly hold that no appeal lies except to the extent mentioned above. 12th Nov. 1903.

It is next argued that at any rate a revision will lie on the ground of material irregularity. Under the ruling of a Full Bench of this Court, *Panna Lal v. Mussamat Soman* ⁽¹⁾, a revision application against a decree based on an arbitration award is competent, but it must have reference to the proceedings of the lower Court, and not to those of the arbitrator. The ground taken here is that the arbitrators exceeded their authority in transferring plaintiff's alleged share in the partnership to Sita Ram, appellant, on payment of a lump sum, and also appellant's liability for the maintenance of Gulzari's widow and daughter and for marriage of the latter to the plaintiff, that this defect in the award is patent on the face of it, and it should, therefore, have been remitted to the arbitrators under Section 520, Civil Procedure Code, and that, in not taking this course, the Court has acted with material irregularity. We shall discuss these objections in their inverse order.

In the first place, the language of Section 520, Civil Procedure Code, seems not to make the remitting of the award compulsory on the Court, but to leave it a discretion. The word used is "may," and the initial words of Section 522 seem to contemplate that the Court shall not remit the award unless it sees cause to do so. There is a decision of a Full Bench of this Court, *Choochar Singh v. Jeet Singh* ⁽²⁾, exactly to this effect, on

(1) 89 P. R., 1902, F. B.

(2) 64 P. R., 1870, F. B.

the corresponding sections of Act VIII of 1859, *viz.*, Sections 323 and 325. It is obvious that the Court will not remit the award unless it holds that the defect mentioned in Section 520 exists, and this is a matter of judgment, *i.e.*, an adjudication which, even if erroneous or wrong in law, is not subject to revision.

In the next place, the parties referred the whole case, and not merely the issues framed by the Court, to the arbitrators, and constituted them sole judges of what matters they had to adjudicate on in order to decide it. They were thus vested with plenary authority. Even if they erroneously decided a matter which did not actually fall within the scope of the case, their error is not one which can be corrected by the Court. To use the language of their Lordships of the Privy Council in *Ghulam Jilani, &c., v. Muhammad Hussan* ⁽¹⁾, in disposing of a similar point, "They may have erred in law, but arbitrators may be judges of law as well as judges of fact, and an error in law certainly does not vitiate the award." These remarks of their Lordships seem fatal to the contention.

In the third place, there is in reality no usurpation of jurisdiction on the part of the arbitrators. Plaintiff sued for a dissolution and winding up of the partnership and for his proper share to be made over to him from the party found to be liable. There were outsiders, *i.e.*, other firms, joined in the partnership, and plaintiffs' case was really to adjust the accounts among the members of the Hindu family which had become partners with them. The arbitrators, who were admittedly very competent men, held that the other members were not liable to make up plaintiffs' share, but that the appellant, Sita Ram, should do so. They only awarded what was due to plaintiffs' father up to the date of his death, and fixed the amount at a lump sum, for payment of which they fixed instalments, and declared that plaintiff shall no longer be a partner in the business. In fact they dissolved the partnership so far as the Hindu family consisting of plaintiff and Sita Ram were concerned, and this was in accordance with plaintiffs' prayer. If the whole partnership had been dissolved, the same result would have followed, but the arbitrators thought, and rightly, that outsiders should not be involved in a family quarrel and put to trouble and inconvenience in consequence, and decided as above. Sita Ram, necessarily, remained a member of the big partnership, but the partnership of the Hindu family with it was

(1) No. 25 P. R., 1902, P. C., at p. 101.

dissolved. This is the true import of this provision in this award though counsel twists it into a compulsory transfer of plaintiffs' interest to the defendant on payment of a price fixed by the arbitrators contrary to the claim. We consider that the arbitrators did not exceed their authority and gave a very proper and equitable decision; at any rate, if any person could complain it was the plaintiff and not the defendant.

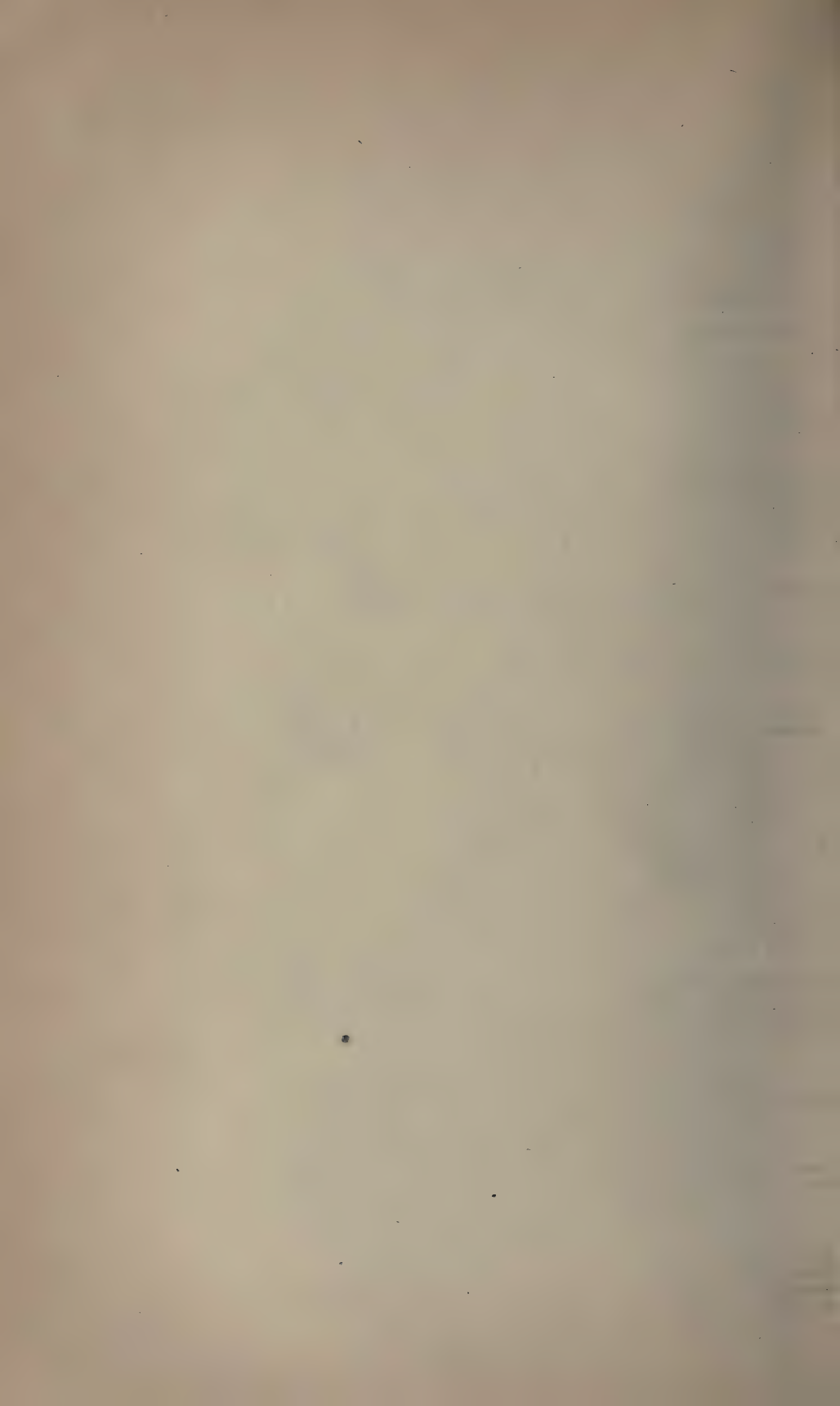
The argument as to transfer of liability for the maintenance of Gulzari's widow and daughter and for the latter's marriage does not injure the defendant at all, but absolves him from a burden imposed on him by Gulzari's will, which the arbitrators set aside. The transfer of the liability to plaintiff was proper as he was awarded Gulzari's share of the partnership property, but defendant, of course, can, if he chooses, discharge that liability himself.

The respondents' counsel admits that the clause in the award about the liability of plaintiff ought to be incorporated in the decree.

We accordingly accept the appeal so far as to direct that the decree be amended by the insertion of the said clause. But the appeal on the merits is dismissed and we hold that there is no valid ground for revision.

Appellant will pay the costs of the appeal.

Appeal dismissed.



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Held, that the evidence of the Store-keeper was inadmissible against the accused. Even if the papers were admissible as public records under Sections 35 and 74 of the Evidence Act, yet they could only be proved by production of the papers themselves or by secondary evidence of the nature described in Section 65 (e), and that they could not be proved by the oral evidence of the witness; and that such evidence even if it was admissible was quite inconclusive and inherently weak as it had not been subjected to cross-examination. *GANGA RAM v. THE EMPEROR OF INDIA* 5

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Under the provisions of Section 41 of the Act it is not essential for an Excise Officer that he should himself take the person arrested before the Magistrate; it is sufficient compliance with the Act if an accused was with all convenient despatch taken before a Magistrate by the ordinary procedure by which accused are brought before the Magistracy. *MOTAN DAS v. THE EMPEROR* 9

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Although it is an inconvenient and improper procedure for a Public Prosecutor not to withdraw until the case is completed, yet the section being imperative, a Sessions Judge is bound to stay proceedings as soon as the Public Prosecutor is instructed to withdraw from the prosecution at any time before an order of conviction or acquittal has been made.

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Held, that the above procedure was quite irregular. The authorities had two courses open to them, either to proceed with the trial as against G alone on such independent evidence as there might be, leaving to consider his position when examined as a witness in the Sessions

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Unless there is some certainty that the facts of a crime cannot otherwise be ascertained, the too common course of trying to induce suspected persons to bid against each other as to who should make the fullest disclosures in the hope of obtaining a pardon and being accepted as approver should not be encouraged. The grant of a pardon is a serious step, to be taken only on ample grounds and with clear recognition of the risk of allowing an offender to escape just punishment at the expense of possibly innocent men which it involves. But, where the circumstances justify that step, the withdrawal of the pardon is an equally serious step, the necessity for which cannot ordinarily be determined until the trial has been completely finished. GHULAM MUHAMMAD v. EMPEROR OF INDIA 4

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Held, that the order as to the payment of a daily fine, after the date of conviction, for failure to comply with the order, was bad, as a fine cannot be imposed prospectively. The words "continuing breach" in Section 169 empower a Magistrate to impose a daily fine from the date mentioned in the notice issued by the Committee under Section 95 up to the date of compliance or to the date of conviction, whichever may first occur. CROWN v. GURDITTA

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SECTION 201.

Recovery of Taxes, etc, by a Committee under the Act—Revision—Power of Chief Court to revise an order passed by a Magistrate under Section 201, Punjab Municipal Act—Criminal Procedure Code, 1898, Section 439.—Held, that arrears of a contract of Municipal sewerage do not come within the scope of Section 201 of the Punjab Municipal Act, and as such are not recoverable under that section.

The section contemplates the realization of arrears of any tax, fee, or any other money claimable by a Committee under that Act as such and does not include the arrears which are claimable under a simple contract.

Held also, that under Section 439 of the Criminal Procedure Code, the Chief Court has power to revise an order passed by a Magistrate granting or refusing an application of a Committee under Section 201 of the Punjab Municipal Act. DIN MUHAMMAD v. MUNICIPAL COMMITTEE OF AMRITSAR

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Q.

QUEEN'S COIN.

See *Penal Code, Section 230.*

R.

RAILWAY COMPANY.

Railway Company—Passenger's luggage—Person sending his luggage by a friend—Cheating—Penal Code, Section 415—Attempt to defraud—Railway Act—Bye-laws imposing penalty for endeavouring to evade payment of full fare.—The petitioner was charged before a first class Magistrate with an offence under Section 417 of the Penal Code, in that he had made over some of his luggage to a friend for conveyance by rail. That charge was dismissed, but the Magistrate convicted him of attempting to defraud the Railway Company by evading a bye-law imposing a penalty in that he had endeavoured to evade payment of charge for overweight, holding that the accused intended to travel by train and had made over his luggage to his friend in order to evade such charge.

The references are to the Nos. given to the cases in the "Record."

RAILWAY COMPANY—*concl'd.*

No.

Held, that the conviction was bad. Every passenger being entitled to the conveyance of a certain quantity of luggage, and in the absence of a rule providing for the conveyance of the passenger's own personal property only, the servants of a Railway Company not being competent to enquire into the ownership of luggage which passengers take with them when travelling. CROWN v. PARAS RAM

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REGULATION III OF 1901.

See *Frontier Crimes Regulation* 8, 15

REVISION.

1. Under Section 439 of the Code of Criminal Procedure, the Chief Court has power to revise an order passed by a Magistrate granting or refusing an application of a Committee under Section 201 of the Punjab Municipal Act. DIN MUHAMMAD v. MUNICIPAL COMMITTEE OF AMRITSAR

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2. *Sanction to prosecute—Dismissal of a complaint by a third person—Initiation by Court—Revocation of sanction granted by a District Magistrate of its own motion by Sessions Judge—Power of Chief Court to revise the order of the Sessions Judge on an application by a third person—Criminal Procedure Code, 1898, Sections 195—439—*The petitioner applied to the District Magistrate for sanction under Section 195 of the Code of Criminal Procedure for the prosecution of the respondent for giving false evidence. The District Magistrate rejected this application, but of its own motion directed the prosecution of the respondent for giving false evidence with the intention of evading payment of income-tax, this order was set aside by the Court of Session. The petitioner, who had taken no action against the order of the District Magistrate refusing him sanction, applied for revision of the order of the Sessions Judge.

Held, that the petitioner's remedy was by revision of the order rejecting his application for sanction. The Chief Court as a Court of Revision will not act under Section 439 of the Code on the initiative of a private individual where by doing so it would allow that individual to usurp the function of the Magistrate of the District who could, if so advised, apply for revision. GURMUKH SINGH v. NAMAN

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S.

SANCTION TO PROSECUTE.

See *Revision, No. 2* 30

SECURITY FOR GOOD BEHAVIOUR.

Security for good behaviour—Discharge of person called upon—Power of District Magistrate to order further enquiry—Accused person—Criminal Procedure Code, 1898, Sections 110 119, and 437.—Held, that a District Magistrate is competent to revise the proceedings of a Magistrate subordinate to him who, under Section 119 of the Criminal Procedure Code, has discharged a person called upon under Section 110 to furnish security for good behaviour, but such powers should be exercised sparingly and with great caution and only in those cases where further evidence is forthcoming on the part of the prosecution, and it is undesirable to use such powers with a view that another Magistrate should hear and decide the matter on the same evidence.

The references are to the Nos. given to the cases in the "Record."

No.

SECURITY FOR GOOD BEHAVIOUR—*contd.*

A person against whom proceedings are taken under Section 110 of the Code of Criminal Procedure is "an accused person" within the meaning of Section 437 of the Code. *MANNA v. KING-EMPEROR* ...

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2. *Criminal Procedure Code, 1898, Section 110—Security for good behaviour from habitual offenders—Evidence—Personal knowledge of Magistrate—Procedure—Remarks respecting witnesses—Witnesses not to be restrained from stating their real opinions.—Held, that in a trial under Section 110, Criminal Procedure Code, Magistrates are not competent to base their orders on their local and personal knowledge of the accused and witnesses.*

It is a fundamental principle in the administration of justice that the accused should know what the evidence against him is, and that he should have an opportunity of testing it by cross-examination, and this principle is violated where the Magistrate's order is based upon knowledge locked up within his own breast and not placed on the record.

The proper procedure where it is important to utilise the personal knowledge of a Magistrate is for the case to be tried by another Magistrate, and for the Magistrate with the personal knowledge to give evidence as a witness.

The right of Magistrates to make disparaging remarks on persons who appear or are named in the course of a trial is one that should be exercised with great reserve and moderation, especially where the person disparaged has had little or no opportunity of explaining or defending himself. It would involve a great danger to the administration of justice if witnesses were restrained from stating their real opinions for fear of displeasing the Magistrate before whom they are giving evidence, and great caution should be taken to avoid producing such an unfortunate result. *NUR DIN KADA v. KING-EMPEROR* ...

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3. *Criminal Procedure Code, 1898, Sections 107, 110, 514—Security for good behaviour—Execution of bond under Section 107 by mistake—Forfeiture of such bond on a conviction of the principal for an offence under Section 430, Indian Penal Code.—Notice having issued calling upon A to show cause why he should not execute a bond with sureties for his good behaviour, an order, purporting to be made under the authority of Section 110, Criminal Procedure Code, was passed in February 1902, and was upheld on 2nd April 1902, on appeal by the District Magistrate. By mistake a form for a bond under Section 107 was substituted for the form under Section 110, and was duly executed by A and his sureties. On the 27th February 1903, A was convicted of having, on the 15th November 1902, cut the bank of a canal distributary which watered a village below his village and was sentenced under Section 430 of the Penal Code, to rigorous imprisonment for six months. On the 2nd March 1903, the police reported that A's security should be forfeited, whereupon an order against A and his sureties was eventually passed forfeiting the amount mentioned in the bond.*

Held, that the bond having been executed under a mistake and without any authority or order for a bond under Section 107 to be taken from A or his sureties, the order forfeiting the security was bad in law and must be set aside.

The references are to the Nos. given to the cases in the "Record."

No.

SECURITY FOR GOOD BEHAVIOUR—*concl'd.*

Held, also, following Queen-Empress v. Man Mohan Lal, that when a forfeiture of recognizance bond has been proved before a Magistrate, it is not incumbent on the prosecution to prove at the hearing after notice that the principal had been properly convicted. WADHAWA SINGH v. KING-EMPEROR...

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SENTENCE.

1. *Power of District Magistrates with respect to cases submitted to them under Section 349, Criminal Procedure Code, to inflict severe sentences.*

See Criminal Procedure Code, Section 349

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2. *Sentence—Sentence after previous convictions for similar offences—Penal Code, Section 75.—The accused, who had already been six times convicted of similar offences, was charged, under Section 379, Indian Penal Code, with the theft of a pair of shoes. The Magistrate found him guilty and convicted him to a year's rigorous imprisonment and thirty stripes.*

Held, that the Magistrate should have committed the prisoner to the Court of Sessions, as the case was one in which the advisability of transporting him for life should have been carefully considered. In such cases too much importance should not be attached to the value of the property stolen in awarding sentences, the important question to consider is the intention of the man and his character and attitude towards society. CROWN v. NUR DIN

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3. *Sentence—Sentence of transportation in lieu of imprisonment—Penal Code, Sections 59, 395.—Held, that the term of transportation under Section 59 of the Penal Code, the only authority for passing sentences of transportation for a period short of life, may not exceed the term of imprisonment provided by law for the offence committed. ARURA v. EMPEROR*

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W.

WITNESS.

Right of Magistrate to make remarks respecting witnesses—Witnesses not to be restrained from stating their real opinions.

See Security for good behaviour, No. 2

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Chief Court of the Punjab.

CRIMINAL JUDGMENTS.

No. 1.

Before Mr. Justice Reid and Mr. Justice Kensington.

BAMAN,—APPELLANT,

Versus

THE EMPEROR OF INDIA,—RESPONDENT.

} APPELLATE SIDE.

Criminal Appeal No. 247 of 1902.

Penal Code, Sections 230, 235—Queen's coin—Murshidabad rupees of the 19th year of Shah Alam—Possession of instrument for purpose of using the same for counterfeiting coin.

Held, that inasmuch as the Murshidabad rupees of the 19th year (Jaloos) of Shah Alam were formerly used with the sanction of the Government of British India for the time being as money, such rupees are under Section 230, Indian Penal Code, Queen's coin, and the conviction under the second part of Section 235 of the Penal Code of a person who was in possession of eight metal dies and intended to coin imitations of such rupees was right and proper.

Appeal from the order of Major G. C. Beadon, Sessions Judge, Jullundur Division, dated 16th May 1902.

Grey and O'Gorman, for appellant.

Turner, Government Advocate, for respondent.

The facts of the case are sufficiently given in the judgment of the Court delivered by—

KENSINGTON, J.—The appellant, Baman, has been convicted under the second part of Section 235, Indian Penal Code, of being in possession of eight metal dies intended for the counterfeiting of Queen's coin, namely, Murshidabad rupees, dated the 19th year of Shah Alam. The contention of the Crown is that these rupees stand on the same footing as Farrukhabad rupees under illustration (c) which was added to Section 230, Indian Penal Code, by Act VI of 1896.

3rd Nov. 1902.

The appellant admits that the dies which were seized in the post in May 1901 belong to him, and that his intention was

to coin imitation *Murshidabad* rupees from them in silver. His defence is that he was unaware that he was infringing the law by doing so.

Before dealing with this plea two technical pleas raised for the first time in the appeal may be disposed of. The first is that the Sessions Judge had no authority to convict in the face of his previous order of the 17th December 1901, but after examining the previous record we do not find that there was any irregularity or illegality in the procedure, and we understand that the learned counsel for the appellant now gives up his contention on the point.

The second plea, covering the 4th and 5th grounds of appeal, is explained as meaning that so far as Section 235, Indian Penal Code, is concerned, there is a flaw in the amending Act VI of 1896. The contention is that the word "Queen's coin" in the second part of Section 235 must be taken as included in the word coin in the first part, and that as the definition of coin in Section 230 has not been amended to cover cases of this kind the conviction under Section 235 cannot stand. We do not think that this very subtle construction of Sections 230 and 235 can be supported, or that any amendment of the latter section was required to carry out the intention of Act VI of 1896. The effect of the second part of Section 235 is to substitute Queen's coin for the word coin in the first part, and we are unable to allow that the one must be included in the other. We reject this plea.

There remains the question whether any offence has been committed where the avowed intention is to counterfeit *Murshidabad* rupees, seeing that Section 230 makes no mention of these coins, and that so far as can be ascertained the framers of Act VI of 1896 did not contemplate action in respect of any coins other than *Farrukhabad* rupees.

After considering the circumstances under which the Act was passed, we think it clear that its framers were not as a fact aware that the East India Company coined rupees in the name of Shah Alam other than those bearing the mint title of *Farrukhabad*. It was not, however, to be expected that the framers of the Act should necessarily be acquainted with the tangled history of numismatics during Shah Alam's reign, and the form in which the amendment of Section 230 was drawn, with the *Farrukhabad* rupee specially mentioned by way of illustration only admits of application of that section to rupees of other mint titles coming under the same description.

The authorities which we have been able to consult are not unanimous as to the precise circumstances of the Company's coinages of rupees in the name of Shah Alam. Mr. Rodgers (page 115 of his Treatise on coin collecting in Northern India) states that millions of rupees were so struck bearing the mint titles of Murshidabad, Benares, Farrukhabad and Surat, though the real mints were Calcutta and Bombay. Mr. Stanley Lane-Poole's introduction to the catalogue of coins of the Moghul Emperors in the British Museum, pages 108 to 113 (1892 Edition) and elsewhere, gives a somewhat different account of the matter, but we need not enter into the *minutiae* of the question from the coin collector's point of view. Both make it quite clear that side by side with the native mint coinages of Shah Alam bearing the names of Farrukhabad, Murshidabad and other places there were Company's issues bearing (nominally or otherwise) the names of the same two or more mint places.

The Murshidabad rupees so coined were given a conventional date of the 19th and the Farrukhabad rupees of the 45th year of the reign, and examination of the specimen coins and descriptions given in the coin catalogues of the British and Indian Museums shows that there are certain differences in the inscriptions as well as in the workmanship of these Company's coins by which they can be readily distinguished, from native issues of Shah Alam's reign bearing the same dates and mint titles.

The dies seized are clearly intended for imitations of the Company's issue of Murshidabad rupees. We must hold therefore that they were to be used for counterfeiting Queen's coin, having regard to the admissions made by appellant himself and to the definition of counterfeit in Section 28, Indian Penal Code. We accordingly uphold the conviction.

As regards sentence there is much to be said for the appellant. His offence has only come within the purview of the law since 1896 and his belief that Murshidabad rupees of the kind could even now be imitated without infringing the law appears to be generally prevalent. We are satisfied from certain copies produced that District and other Magistrates in Amritsar, Cawnpore, Faizabad and Lucknow at any rate have as lately as 1901 given instruction that the manufacture or sale of Murshidabad rupees of the kind is not illegal. We find that these instructions are based on a misapprehension, but where the misapprehension exists in the minds of experienced officials an uneducated man like the appellant may fairly plead ignorance of the law as an excuse.

We consider the sentence of three years' imprisonment awarded by the Sessions Judge to be altogether excessive, and considering that this is the first case of the kind, so far as we are aware, a nominal sentence would have been sufficient to secure the object of the prosecution. One way and another the appellant has been about nine months in custody over the case either pending trial or as a convict, some four months of the time being in the latter capacity. We think that even that period was excessive, but need not now order a nominal reduction. The appeal is accordingly accepted to that extent, the conviction being upheld, but the sentence reduced to the period of imprisonment already undergone, and the appellant is discharged from the bail to which he was admitted in this Court.

The eight dies produced will be confiscated, but so much of the coins and other exhibits in the case as have been taken from the appellant should be returned to him. The record does not show us exactly which of these articles were obtained from him, or for what purpose some of them (such as certain British and Mexican dollars) were impounded. It is not alleged by the learned Government Advocate that an offence was committed in respect of any of these exhibits except the dies.

No. 2.

Before Mr. Justice Anderson.

MURAD AND OTHERS,—PETITIONERS.

Versus

THE EMPEROR,—RESPONDENT.

Criminal Revision No. 654 of 1902.

Criminal Procedure Code, 1898, Sections 133-137—Public nuisance—Obstruction in a public channel—Dispute as to right to close a certain passage—Bona fide question of title.

In a case where the dispute was between the proprietors of two villages about the removal of a *band* recently constructed by the petitioners within the boundaries of their own lands, which had the effect of preventing the water flowing through a *phat* or backwater of the river Chenab from going on to the lands of the respondent's village; and where there was, evidently, a dispute as to petitioner's right to close the passage and a *bona fide* assertion on their part in which the general public was not at all concerned, nor in the result of the dispute. *held*, that the Magistrate had no jurisdiction to proceed under Section 133 of the Criminal Procedure Code. In proceedings under that section to compel the removal of an unlawful obstruction it is necessary for a Magistrate to determine whether the denial of the public character of the property,

REVISION SIDE. {

obstruction of which has been alleged is a *bonâ fide* objection or not, and unless he holds the objection to be not *bonâ fide*, the matter should be left to the determination of the Civil Court.

Luckhee Navain Binerjee v. Ram Kumar Mukerjee ⁽¹⁾, *Queen-Empress v. Bissessur Sahu* ⁽²⁾, *In re Maharana Shri Jaswatsangji Futesingji* ⁽³⁾, *Hari Mohun Thakur v. Kissen Sundari* ⁽⁴⁾, *The Empress v. Prem Singh* ⁽⁵⁾ and *Kailash Chunder Sen v. Ram Lal Mitra* ⁽⁶⁾ referred to.

Petition for revision of the order of Khan Bahaâdur Nawab Muhammad Afzal Khan, District Magistrate, Jhang, dated 2nd June 1902.

Shah Nawaz, for petitioners.

Lal Chand, for respondent.

The judgment of the learned Judge was as follows:—

ANDERSON, J.—An order has been passed, apparently under 29th Sept. 1902. Section 137, Criminal Procedure Code, directing certain persons, inhabitants of *mauza* Budwanain, Jhang District, to remove a *band* recently constructed by them within the boundaries of their own land, which has the effect of preventing the water, which flows through a *phat* or backwater of the Chenab, from going on to the land of Kakkawala.

The Magistrate, who decided the case, was of opinion that this *phat* was a common and natural one, but it is not quite apparent whether he had any idea of laying down that it was a public river, the obstruction of which could be regarded as affecting the public generally, as distinguished from riparian owners.

The District Magistrate, before whom the case afterwards went, although he seemed disposed to think that the persons who first receive the flow of natural water on their lands had the right to secure a sufficient supply for their own use, declined to forward the case for revision on the ground that the complainant had, probably, acquired a right of easement.

Stress is laid on this point in the application before this Court in support of the argument that the local Magistrates have throughout failed to discriminate between a public nuisance and the infringement of a private right, which might afford cause of action for a civil suit.

It appears that, previous to the opening of the Chenab Canal, neither of the parties concerned found much difficulty in obtaining

⁽¹⁾ I. L. R., XV Calc., 564.

⁽²⁾ I. L. R., XVII Calc., 562.

⁽³⁾ I. L. R., XXII Bom., 988.

⁽⁴⁾ I. L. R., XI Calc., 52.

⁽⁵⁾ 6 P. R., 1887, Cr.

⁽⁶⁾ I. L. R., XXVI Calc., 869.

sufficient water to moisten their lands from the river but, as the water level on the lower Chenab has fallen considerably, inlets, which formerly supplied a good deal of water to the adjacent *sailaba* lands, now supply less and, as invariably occurs, the persons whose land lies further down the course of the river have to seek for a head to any inundation canal running through their land higher up the course. This is exactly what has happened here. The Wakefieldwah made in the time of the second Settlement, which supplied Kakkawal and other villages, ceased to run and, if a head could have been opened higher up the river, more water would have come to it. Till petitioners made the *band* in their own land a certain amount of water flowed on towards Wakefieldwah and, until recently no dispute occurred, but when the petitioners, taking advantage of their position, stopped this flow, a grievance arose.

It is contended for respondents that, because the water now diverted used to go on through the Wakefieldwah to Kakkawal and other villages, the *phat* should be regarded as a public river, and it is also contended that petitioners are not setting up a *bonâ fide* claim of title to the land or water of the *phat*. *Luckhee Narain Banerjee v. Ram Kumar Mukerjee* ⁽¹⁾ and *Queen-Empress v. Bissessur Sahu* ⁽²⁾, are relied on as authorities for holding that when there is no *bonâ fide* claim of title involved in a dispute of this sort the Magistrate may pass an order under Sections 133 and 137, Criminal Procedure Code.

I do not think this argument gets over the difficulty that an order of this sort can be passed only when an unlawful obstruction of a public use is made. *In re Maharana. Shri Jaswatsangji Fatesingji* ⁽³⁾ is a case much in point. In it a dispute arose between the proprietors of two *talugdari* villages situate on the banks of a river (not very dissimilar to this *phat* of the Chenab, for it is remarked at page 992 that it was finally absorbed into the soil of the respective villages) about the diversion of the course of the river by means of a dam and trench made by one of them in the current of the river, each *talugdar* claiming the river as his own private property. It was held that, assuming the water in question to come under the definition of a river, no user by the public, actual or possible, had been proved: that a public river would be one that was subjected by law to a kind of servitude in favour of *all* members of the State, and that under the circumstances the Magistrate had no jurisdiction

⁽¹⁾ I. L. R., XV Cal., 564.

⁽²⁾ I. L. R., XVII Cal., 562.

⁽³⁾ I. L. R., XXII Bom., 988.

to interfere under Section 133 of the Criminal Procedure Code. In the present case I think the evidence of user quite insufficient.

In *Hari Mohun Thakur v Kissen Sundari* ⁽¹⁾, where the right to restrain another from exercising ordinary proprietary rights over his own land by refraining from cutting a *band* which had the effect of giving a liberal supply of water to their land, it was held that the burden of proving such right lay on the party alleging it, and that care would have had to be exercised before issuing an order under Section 147 of the Criminal Procedure Code.

The Empress v. Prem Singh ⁽²⁾, and *Kailash Chunder Sen v. Ram Lal Mittra* ⁽³⁾, as well as the two rulings quoted by the respondent's pleader, all discuss the question of the necessity for the Magistrate to determine whether the denial of the public character of the property, obstruction of which has been alleged, is a *bonâ fide* objection or not and, unless he holds the objection to be not *bonâ fide*, the matter should be left to the determination of the Civil Court.

In the present proceedings there is no such preliminary finding. A case brought against present petitioners under Section 430, Indian Penal Code, was dismissed on the ground that their action in raising the *band* was not *mala fide*, or with the intention of injuring the proprietors of Kakkawal, but merely for their own benefit. The District Magistrate seems also to have taken this view, but he did not, apparently, realize that the jurisdiction of the Criminal Courts might be ousted by the Civil Courts in a question of private as distinguished from public nuisance.

I consider with reference to the weight of authority adduced, this case was not one in which the provisions of Section 133, Criminal Procedure Code, could be applied. It is alleged that no conditional order was duly passed and served on the present petitioners. If this defect exist, it might, perhaps, have been got over as there can be no doubt that petitioners knew very well to what the proceedings were directed. But, as there is, evidently, a dispute as to petitioner's right to close the passage and a *bonâ fide* assertion of title on their part and, as the general public is not at all concerned in the result of the dispute, the matter cannot be disposed of as has been attempted by the

(¹) *I. L. R.*, XI *Calc.*, 52. (²) 6 *P. R.*, 1887, Cr.

(³) *I. L. R.*, XXVI *Calc.*, 869.

present order, which, if allowed to stand, might bar the jurisdiction of the Civil Court under clause (2) of the section. This in itself shows how cautious the Criminal Courts ought to be in applying Section 133 of the Criminal Procedure Code.

The order of the Magistrate complained of is accordingly revised and set aside.

Application allowed.

No. 3.

Before Mr. Justice Harris.

AMIR KHAN,—PETITIONER,

Versus

THE EMPEROR—RESPONDENT.

Criminal Revision No. 39 of 1902.

Criminal Procedure Code, 1898, Sections 350, 537—Conviction by Magistrate on evidence recorded by his predecessor—Omission to ascertain whether in accordance with the proviso to Section 350 a rehearing was demanded—Irregularity.

Although a refusal on demand under Section 350 (a) to rehear evidence amounts to disobedience to an express provision as to a mode of trial which is not a mere irregularity and is not curable by Section 537, yet in a case where there was no demand or refusal but only an omission to enquire from the accused whether he wished to exercise the right reserved by proviso (a) to Section 350, *held*, that as the accused had not been materially prejudiced or a failure of justice occasioned the omission was an irregularity curable by Section 537 of the Criminal Procedure Code.

Kesra Ram v. The Empress ⁽¹⁾, *Subrahmanya Ayyar v. King-Emperor* ⁽²⁾, and *Gomer Sirda v. Queen-Empress* ⁽³⁾, referred to.

Petition for revision of the order of W. Chevis, Esquire, Sessions Judge, Ferozepore Division, dated 23rd December 1901.

Beechey, for petitioner.

Government Advocate, for respondent.

The judgment of the learned Judge was as follows :—

4th April 1902.

HARRIS, J.—This is an application for revision of the order of the Sessions Judge, Ferozepore Division, affirming the order of Mr. Millar, District Magistrate, Ferozepore, dated the 29th October 1901, convicting Amir Khan, petitioner, under Section 409, Indian Penal Code, and sentencing him to four years' rigorous imprisonment, including three months' solitary confinement and

⁽¹⁾ 6 P. R., 1884, Cr.

⁽²⁾ I. L. R., XXV Mad., 61.

⁽³⁾ I. L. R., XXV Cal., 863.

to pay a fine of Rs. 600 or in default of fine to suffer a further term of six months' rigorous imprisonment.

The trial was, with the exception of judgment, concluded before Mr. Yewdall, the predecessor of Mr. Millar, on the 18th October 1901, but Mr. Yewdall, apparently though not certainly, after making over charge drew up a memorandum in the form of, and headed as a judgment giving reasons, *inter alia*, for finding Amir Khan guilty, and suggesting the sentence afterwards inflicted by his successor Mr. Millar. Mr. Millar appears to have perused the record for he expressed agreement with what his predecessor had written, but it seems that he did not call up the accused in order to ascertain whether in accordance with the proviso to Section 350, Criminal Procedure Code, a rehearing was demanded, and he proceeded to judgment holding that the accused would not be prejudiced in any way, and convicted and sentenced Amir Khan, amongst others, as above mentioned.

The Sessions Judge held on appeal that Amir Khan had not been prejudiced by the defect in procedure nor had any failure of justice arisen therefrom, and on the authority of *Kesra Ram v. The Empress* ⁽¹⁾ he considered that defect to be an irregularity curable by the force of Section 537, Criminal Procedure Code.

It is urged by counsel for petitioner that the omission by Mr. Millar to give an opportunity for a demand that the evidence should be reheard such as is provided for by Section 350 (a), Criminal Procedure Code, materially prejudiced the petitioner and the terms of that section being imperative, the omission was no mere irregularity but an illegality not curable by Section 537, Criminal Procedure Code, and the Privy Council ruling reported in *Subrahmaniam Ayyar v. King-Emperor* ⁽²⁾ is cited in support of the contention.

The Privy Council ruling is not directly in point, being a case in which forty-one acts extending over a period of two years were charged in contravention of Section 234, Criminal Procedure Code, their Lordships holding that such procedure clearly prejudiced the accused, and that "such a phrase as irregularity is not "appropriate to the illegality of trying an accused person for "many offences at the same time and those offences being spread "over a longer period than by law could have joined together in "one indictment." It was laid down that the disobedience to an express provision as to a mode of trial is not a mere irregularity. It would seem that a refusal on demand under Section

(¹) 6 P. R., 1884, Cr.

(²) I. L. R., XXV Mad., 61.

350 (a) to rehear evidence would amount to such disobedience, and would not be curable by Section 537; and it was so held by one of the Judges in *Gomer Sida v. Queen-Empress* ⁽¹⁾. But in the present case there was no refusal but an omission to enquire from the accused and so there was an absence of demand. Under those circumstances the question to be decided is that which is indicated by Section 350 (b) and which determines whether the omission is one curable by Section 537, viz., whether the accused has been materially prejudiced or a failure of justice has been occasioned by such omission. For the above reasons I agree with the learned Judges in *Kesra Ram v. The Empress* ⁽²⁾, a case almost precisely similar to the present, that if the accused was not prejudiced Section 537 cures the defect.

I cannot see how the petitioner was prejudiced. Mr. Millar agreed with the view of his predecessor who had heard all the evidence and written what would have been but for the fact that he had just made over charge a complete judgment and sentence. I therefore refuse to interfere on the point of law.

There appears no reason whatever to revise on the facts. There was ample evidence to sustain the conviction if believed, and the evidence has been weighed and believed by two Courts. There are no apparent reasons for disbelieving it. I do not consider the sentence too severe. Petitioner was in a position of considerable trust as a public servant and he abused that trust. The fine inflicted was heavy but appropriate. I dismiss the petition.

Application dismissed.

⁽¹⁾ I. L. R., XXV Cal., 863.

⁽²⁾ 6 P. R., 1884, Cr.

No. 4.

Before Mr. Justice Reid and Mr. Justice Kensington.

GHULAM MUHAMMAD,—APPELLANT,

Versus

THE CROWN,—RESPONDENT.

Criminal Appeal No. 379 of 1902.*

} APPELLATE SIDE.

Criminal Procedure Code, 1898, Sections 337, 339—Pardon—Tender of pardon to accomplice—Pardon withdrawn before the case was committed to the Court of Sessions—Effect of such withdrawal at that stage—Admissibility of statement made as an approver after withdrawal of pardon—Confession caused by promise irrelevant in criminal proceedings—Evidence Act, 1872, Section 24—Observations as to the granting and withdrawing of pardon.

Both B and G were suspected of being parties to a murder. The District Magistrate tendered a pardon to B. When the case came before the Committing Magistrate B retracted his statement absolutely, whereupon the District Magistrate withdrew the pardon offered to him at once, without waiting for the completion of the trial, and both the accused were committed to the Court of Session. The Sessions Judge used B's incriminating statement, made as an approver against him alone, but used his first confession implicating himself as well as G, which had been made in the hope of obtaining a pardon against both the accused, and convicted them both of the offence of wilful murder.

Held, that the above procedure was quite irregular. The authorities had two courses open to them, either to proceed with the trial as against G alone on such independent evidence as there might be, leaving B to reconsider his position when examined as a witness in the Sessions Court under clause (2) of Section 337, Criminal Procedure Code, and thereafter if so advised proceeding against him under Section 339 if he persisted in denying the statement formerly made by him as an approver or to commence, *de novo*, the trial of both B and G jointly, after withdrawing the pardon offered to the former, in which case no part of B's statement as an approver could be utilised against himself or against any one with whom he was being jointly tried, such statement being irrelevant under Section 24 of the Evidence Act, notwithstanding the special provision of clause (2) of Section 339, Criminal Procedure Code. To enable that special clause to operate against an approver it is essential that the provisions of the law dealing with the tender of pardon to an accomplice should have been followed, including the provision requiring him to be examined as a witness in the case.

Unless there is some certainty that the facts of a crime cannot otherwise be ascertained the too common course of trying to induce suspected persons to bid against each other as to who should make the fullest disclosures in the hope of obtaining a pardon and being accepted as

* Note.—Criminal Appeal No. 404 of 1902 was also disposed of by the judgment in this case.

approver should not be encouraged. The grant of a pardon is a serious step, to be taken only on ample grounds and with clear recognition of the risk of allowing an offender to escape just punishment at the expense of possibly innocent men which it involves. But, where the circumstances justify that step, the withdrawal of the pardon is an equally serious step, the necessity for which cannot ordinarily be determined until the trial has been completely finished.

Queen-Empress v. Bhan ⁽¹⁾, *Queen-Empress v. Brij Narain Man* ⁽²⁾, *Queen-Empress v. Mihan Singh* ⁽³⁾, and *Hargulal v. Emperor of India* ⁽⁴⁾, cited.

Appeal from the order of Khan Bahadur Maulvi Inam Ali, Sessions Judge, Multan Division, dated 7th August 1902.

Umar Bakhsh, for appellant.

Petman, Assistant Legal Remembrancer, for respondent.

The judgment of the Court (so far as it is material for the purposes of this report) was delivered by :—

3rd Nov. 1902.

KENSINGTON, J.—This case is before us on separate appeals, No. 379 by Ghulam Muhammad and 404 by Ehuja, which may be disposed of together, and also on a reference under Section 374, Criminal Procedure Code, for confirmation of the sentences of death passed on both appellants.

We are obliged to comment unfavourably both on the manner in which the police investigation was conducted and on certain incidents connected with the trial. The case is one of a kind with which this court is only too familiar. A brutal murder was committed late on in the night of the 1st June, and Muhammad Khan, aged 40, and his infant son, Ilahi Bakhsh, were shot dead as they were lying asleep on one charpoy in an open courtyard, the gun being fired at such close range that their clothes were set on fire. There was no immediate clue, and the first report, which reached the police 11 miles off at 7 A. M. of the 2nd June, mentions that no one was known to be suspected. Nevertheless strong suspicion fastened on the appellants, rightly or wrongly, at an early stage in the course of the day, and it is not improbable that a patient enquiry would have brought home the offence to one or both of them, or shown that the clue obtained was incorrect. Instead of attempting to work up the case by legitimate methods of investigation the officials concerned followed the too common course of trying to induce the suspected men to bid against each other as to which should make the

⁽¹⁾ I. L. R. XXIII Bom., 493.

⁽²⁾ I. L. R., XX All., 520.

⁽³⁾ 5 P. R., 1899, Cr.

⁽⁴⁾ 24 P. R., 1902, Cr.

fullest disclosures in the hope of obtaining a pardon and being allowed to turn approver. There was at that stage no certainty that the facts of the murder could not be otherwise ascertained, and, even if the disclosures could be depended on as correct, the approvers' evidence might be too dearly purchased by a pardon, involving that one at least of the offenders would go free.

Statements believed to be sufficiently incriminating were, however, obtained in this way on the 3rd June, and on the 4th the District Magistrate somewhat hastily sanctioned a pardon to one of the men, leaving a subordinate Magistrate to determine which of the two should be selected. This was done on the 6th June and Bhoja's statement was recorded as an approver, and he then pointed out two places, where a gun and a pair of socks were found to support his story. Witnesses were then obtained to corroborate minor details fitting in with his statement, and the case was considered complete for trial.

We must point out once more the serious risk of unsatisfactory results from an investigation conducted in this manner. It is unsafe to rely so implicitly on statements made by men who knew themselves to be under suspicion, and to whom it is represented that their only hope of escape consists in telling a story by which each may throw the blame chiefly on the other, while the corroborative evidence which is only forthcoming after the disclosures is necessarily of a questionable nature when it follows closely on conventional lines.

When the case came before the Committing Magistrate the approver, Bhoja, retracted his statement of the 6th June absolutely, denying even that a promise of pardon had ever been made to him. This was on the 19th June, and one of two courses was then open to the authorities. They could either proceed with the trial as against Ghulam Muhammad alone, on such independent evidence as there might be, leaving Bhoja to reconsider his position when examined as a witness in the Sessions Court under clause (2) of Section 337, Criminal Procedure Code, and thereafter, if so advised, proceeding against him under Section 339 if he persisted in denying his story of the 6th June, or they could begin the trial, *de novo*, as against Bhoja and Ghulam Muhammad jointly, after withdrawing the pardon offered to the former. The first is the course contemplated by Section 337 of the Code and is indeed the only course admissible if we follow the ruling in *Queen-Empress v. Bhan* (1), but we think that the second is also

(1) I. L. R., XXIII Bom., 493.

compatible with the terms of Section 337 read with Section 339, as has been held by the High Court of Allahabad in *Queen-Empress v. Brij Narain Man* ⁽¹⁾ and by this Court in *Queen-Empress v. Mihan Singh* ⁽²⁾.

It must, however, be clearly recognized, as we have recently pointed out in *Hargul v. The Emperor of India* ⁽³⁾, that where the second course is followed and a pardon is revoked at any stage before the final trial, and where proceedings are in consequence taken against the approver before he has had the full opportunity which the law requires of giving his evidence at that trial, no part of his earlier statement as an approver can be utilised against himself, much less against any one with whom he is being jointly tried.

We regard this view of the law bearing on the point as quite clear. The grant of a pardon to a man who implicates himself and others in a murder is not a mere incident in a case to be lightly agreed to as a means of saving further trouble. It is a serious step, to be taken only on ample grounds and with clear recognition of the risk which it involves, of allowing an offender to escape just punishment at the expense of possibly innocent men. But where the circumstances justify that step the withdrawal of the pardon is an equally serious measure, the necessity for which cannot ordinarily be determined until the trial has been completely held. In the present case the District Magistrate withdrew Bhoja's pardon on the 21st June, when he had no means of finally deciding whether the statement of the 6th June was correct or that of the 19th. We are unable to agree with the learned Sessions Judge that this was a judicious order, but if it could be justified at all it could only be by treating Bhoja thenceforward as a person to whom pardon had never been given, and by ignoring all that he had said in the capacity of approver. His statement in that capacity had been made under a condition not fulfilled, namely, that he should be examined at the trial. If the prosecution was not prepared to treat him as a witness, preferring to deal with him as a co-accused, his earlier statement would be irrelevant under Section 24 of the Evidence Act, notwithstanding the special provision of clause (2) of Section 339, Criminal Procedure Code. From pages 26 and 27 of the Judgment we gather that the Sessions Judge professed to use that statement against Bhoja alone, but the proper course was to

⁽¹⁾ I. L. R., XX All., 529. ⁽²⁾ 5 P. R., Cr., 1899.

⁽³⁾ 24 P. R., Cr., 1902.

refuse either to refer to it in any way or to bring it on to the record as part of the evidence in the case. The value of the opinion given by the assessors against both the appellants is largely reduced by the use made of that statement as, whatever may have been the case with the learned Sessions Judge, it was scarcely possible for them to keep their minds free from prejudice after hearing it read.

* * * * *

(Note.—The remainder of the judgment deals with the facts of the case, and is immaterial for the purposes of this report.—ED., P. R.)

No. 5.

Before Mr. Justice Clark, Chief Judge.

GUNGA RAM AND OTHERS,—APPELLANTS,

Versus

THE EMPEROR OF INDIA,—RESPONDENT.

Criminal Appeal No. 435 of 1902.

} APPELLATE SIDE.

Public documents, proof of—Secondary evidence relating to documents—Oral evidence of the contents of a document not admissible—Value of evidence not subjected to cross-examination—Evidence Act, 1872, Sections 65 and 74.

The accused were charged and convicted with forging a bond, dated 31st July 1884, the conviction rested principally upon the evidence of the Storekeeper in the office of the Superintendent of Stamps, Calcutta, who deposed that the stamp paper on which the bond was written was not manufactured until the 1st February 1890. His knowledge being based on papers received from the India Office which were not produced. On appeal the accused objected that this evidence was inadmissible, and, even if admissible, was worthless, as the witness had not been cross examined.

Held, that the evidence of the Storekeeper was inadmissible against the accused. Even if the papers were admissible as public records under Sections 35 and 74 of the Evidence Act, yet they could only be proved by production of the papers themselves or by secondary evidence of the nature described in Section 65 (e), and that they could not be proved by the oral evidence of the witness; and that such evidence even if it was admissible was quite inconclusive and inherently weak as it had not been subjected to cross-examination.

Appeal from the order of Captain C. H. Buck, District Magistrate, Montgomery, dated 4th August 1902.

Grey and O'Gorman, for appellants.

Robinson, Government Advocate, for respondent.

The judgment of the learned Chief Judge (so far as it is material for the purposes of this report) was as follows:—

CLARK, C. J.—This is a conviction for forging a bond for 28th Nov. 1902. Rs. 199-8, dated 31st July 1884. The main evidence in the case

is that of Narain Kissen Sen, Storekeeper, in the office of Superintendent of Stamps, Calcutta, who deposes that the stamp paper on which it was written was not manufactured till February 1st, 1890.

It is objected that this evidence is inadmissible, and, if admissible, is worthless, as the witness could not be cross-examined.

The witness deposed that his knowledge was based on papers received from the India Office, and that he was unable to give a copy of the papers without authorization from his superiors that there were marks on the paper by which he could form an opinion as to the year in which the paper was manufactured, but that the marks were private, and that he was prohibited by his superior from pointing them out.

With reference to the admissibility of this evidence, it is clear that the witness was not giving evidence as an expert, for he was not giving an opinion on any of the points referred to in Sections 45-50 of the Evidence Act, his knowledge was based on the papers received from the India Office, and those papers were not produced. Granting that those papers were admissible as public records under Sections 35 and 74 of the Evidence Act, yet they could only be proved by production of the papers themselves or by secondary evidence of the nature described in Section 65 (e), and they could not be proved by the oral evidence of the witness.

I hold therefore that the evidence of this witness is not admissible.

Even if the evidence were admissible I should consider it very inconclusive owing to the refusal of cross-examination.

It does not appear that the witness's superior actually refused permission to produce the paper received from the India Office, all that appears from his evidence is that he had not obtained the permission and therefore could not produce the papers.

It may be necessary in the public interests that these papers and the marks on the stamp papers should not be divulged, but this in no way removes the weakness inherent in evidence which has not been subjected to cross-examination.

It is essential to the administration of justice that the intelligence and capacity of a witness, and the information upon which his evidence is based, should be freely tested by cross-examination, and where this test has been refused, no matter

what the cause, the evidence becomes inconclusive and unsatisfactory.

An illustration of this proposition is afforded by an unpublished ruling of this Court in Criminal case No. 235 of 1893 in which the same question arose. There the bond alleged to be forged was dated 1886, and the Superintendent of Stamps gave evidence that the stamp paper had not been manufactured till 1887, in that case he produced the chart or papers received from the India Office on which he based his knowledge that the stamp had not been manufactured until 1887, he was cross-examined as to the letters contained in that chart showing in what years papers bearing certain letters were manufactured, and on an analysis of his evidence after cross-examination, Sir Charles Roe held that it was possible that the stamp paper in question had been manufactured in 1886, and Mr. Justice Benton held that the papers received from the India Office only showed that there were certain official arrangements by which stamp bearing certain letters should be supplied in certain years, but that they did not show that these arrangements had been carried out. The evidence of the Superintendent of Stamps was held to have broken down on cross-examination, and the accused was acquitted.

Holding then that the evidence of the Storekeeper in this case is inadmissible, and, if admissible, quite inconclusive, there is hardly any other evidence in the case.

(Note.—The remainder of the judgment is not material for the purpose of this report.—Ed., P.R.)

No. 6.

Before Mr. Justice Anderson.

NATHA SINGH AND OTHERS,—PETITIONERS,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Revision No. 915 of 1902.

REVISION SIDE.

Penal Code, Section 425—Mischief—Bond fide claim of right—Dishonest intention.

A person is not criminally liable for acts of mischief where the act complained of was committed in a *bona fide* exercise of a supposed right and without the intention of causing wrongful loss or damage to any person, therefore in a case where the accused (who were the village proprietors) caused some trees on the village common land to be cut down and there was no satisfactory proof either that they dealt with the property otherwise than under the belief that it was their own or that they intended

to cause damage, held, that they were not guilty of committing mischief even if mistaken in their belief as to their rights.

Shakur Mohamed v. Chunder Mohun Sha ⁽¹⁾, *Issur Chunder Mundle v. Rahim Sheikh* ⁽²⁾, and *Ram Golam Singh* ⁽³⁾, cited.

Petition for revision of the order of E. D. MacLagan, Esquire, District Magistrate, Amritsar, dated 2nd August 1902.

The judgment of the learned Judge was as follows :—

10th Jany. 1903.

ANDERSON, J.—The complainant is the son of one Qadir Bakhsh who occupies a *takyá* in the *shámilat* on a plot which the proprietors either gave to him in 1886, or acknowledged his right.

In an adjoining plot the *Mussalmán Kamins* of the village have set up a mosque which they seem to be making *pakka* against the wish of the proprietors, but they have got a final decree of Court in their favour.

The trees which petitioners caused to be cut down are *kikar* trees said to be within the limits of the *takyá*. The *patuvari* (a *Mussalmán*) gave vague evidence, merely stating that the trees were on *shámilat* and the *shámilat* is all shown as in one number.

This does not coincide with the remark in the Divisional Judge's judgment of 17th June 1902, in the civil suit, to the effect that number of the *takyá* is 427.

The District Magistrate was mistaken in thinking that the cutting of the trees was effected pending continuance of a suit between the parties now concerned, for Nathe Shah, plaintiff, in that suit, referring to the mosque said to be situated in No. 430, is not the same man as the present complainant.

In cutting down the trees I have no doubt the proprietors meant to assert their rights, but, to justify a conviction for mischief, the prosecution must show that the accused caused damage with a wrongful intent, with a knowledge that they were not justified in so doing and that they had no title to the property in dispute.

Now here there seems to be a dispute as to the ownership of the trees, and there has been no determination by a civil Court as to whose they are, and I do not think the Magistrate's finding that they were complainant's property is based on any reliable evidence, whilst the District Magistrate was under a misapprehension in thinking that the civil case decided by Lala Topan Ram and finally decided by the Divisional Judge referred

⁽¹⁾ 21 W. R., 38, Cr.

⁽²⁾ 25 W. R., 65, Cr.

⁽³⁾ 6 W. R., 59, Cr.

to the land of the *takya*. There were only two witnesses for prosecution, and the Magistrate's finding as to accused's intention is not clear, as he makes use of the phrase "probably intended." It has not therefore been satisfactorily proved that the accused, who are the village proprietors, dealt with the property otherwise than under the belief that it was their own, and I do not think they should have been necessarily convicted of mischief, even if mistaken in that belief. This was the view taken in the case of *Shakur Mohamed v. Chunder Moh in Sha* ⁽¹⁾ also in that of *Issur Chunder Mundle v. Rahim Sheikh* ⁽²⁾.

In the case of *Ram Golan Singh, petitioner* ⁽³⁾, it was held by Loch and Jackson, JJ., that the authority vested in the criminal Court of punishing persons for acts of mischief is one which must be exercised with great caution, and it must be very clear before conviction that the accused has brought himself within the meaning of Section 425 of the Penal Code.

In the present case I think the Honorary Magistrate erred in law in convicting when the evidence on the record was, as he himself allowed, only sufficient to show that accused probably intended to cause damage and knew that they had no right to cut these *kikar* trees, as they might, ordinarily, be supposed to have the right in respect of trees growing on *shimilit* ground.

The accused were fully entitled to the benefit of any doubt arising in the case.

I allow the revision, set aside convictions and sentences and direct refund of fines.

Application allowed.

No. 7.

Before Mr. Justice Reid and Mr. Justice Harris.

KEHAR.—APPELLANT,

Versus

THE EMPEROR,—RESPONDENT.

} APPELLATE SIDE.

Criminal Appeal No. 297 of 1902.

Mischief—Mischief by fire with intent to destroy a human dwelling—Penal Code, Section 436.

⁽¹⁾ 21 W. R., 38, Cr. ⁽³⁾ 25 W. R., 65, Cr.

⁽²⁾ 6 W. R., 59, Cr.

The accused was convicted for mischief by fire to a human dwelling under Section 436 of the Penal Code. It was contended that the conviction was bad, on the ground that what was set fire to was the thatch wall of an enclosure only, the residential huts being situated at a distance of several paces from the wall that was ignited.

Held, that although the huts were situated several paces from the wall the accused knew that the fire would be likely to burn the huts in which persons were sleeping and that he was rightly convicted under that section.

Shera v. The Empress ⁽¹⁾, cited, and *Sucha Singh v. The Empress* ⁽²⁾, referred to.

Appeal from the order of Khan Bahadur Maulvi Inam Ali, Sessions Judge, Mooltan Division, dated 10th June 1902.

Muhammad Shah Din, for appellant.

The judgment of the Court was delivered by—

3rd Feby. 1903.

HARRIS, J.—The appellant Kchar has been convicted of committing mischief by fire and sentenced under Section 436, Indian Penal Code, to seven years' rigorous imprisonment.

On the facts we have no hesitation in finding that the appellant intentionally fired the thatched wall of the enclosure of the complainant, Mithu Shah, on the night of the 6th December 1901. The fire was discovered before midnight by Mussammat Izzat, mother of Ramzan, a neighbour, and on her raising an alarm the fire was quickly extinguished after a few feet of the thatched wall of the value, according to Mithu Shah, of some two rupees, had been burnt. The evidence for the prosecution goes to show, and indeed it is not definitely disputed, that tracts of the appellant were found at or near the place where the fire was ignited, and that Mithu Shah accompanied by Wallu and Badla, witnesses (Wallu having some knowledge of tracking), followed the tracks to the appellant's cattle pen. Certain alleged discrepancies in the evidence as to tracks have been alluded to by counsel for appellant, but we have failed to discover any material conflict such as is suggested in that matter. There were tracks both of naked feet and of shoes, and the former, which were close to the spot, and presumably those of the incendiary, were identified as those of the appellant. The shoe tracks, which it is here admitted, might have been of appellant from fields which he cultivated for Ramzan to his cattle pen, are of less importance. On appellant being con-

⁽¹⁾ 35 P. R., 1879, Cr., F. B.

⁽²⁾ 57 P. R., 1887, Cr.

fronted by his tracks the evidence proves that he confessed to the Nawab's agent that he had fired the wall. That confession is admissible in evidence, and is not shown to have been in any way induced by threats or promises. It is true that the later statement before Honorary Magistrate, Ghulam Haider Khan, is an exculpation rather than a confession. But it is of an incriminating nature though Ramzan is there represented as taking the principal part in the commission of the offence. The appellants' *alibi* broke down, and there is evidence that he was absent from his residence during the time the mischief charged was caused. There was practically no defence but a bare denial, and though the prosecution failed to establish a clear motive for the criminal act we consider it extremely probable that the appellant was, as tenant of Ramzan, instigated by him to commit the offence. No reason is disclosed for the fabrication of a false case against appellant to screen the real offender. What was set fire to was the thatch wall of an enclosure in which were several thatched huts where Mithu Shah and his family resided, some of which huts seem to have been situated several paces from the wall of the enclosure. These are all the details as to the nature of the dwelling place available on record. It is contended that the offence was not one under Section 436, Indian Penal Code, as the wall set fire to was not a "building" within the meaning of the section, and *Sucha Singh v. The Empress* ⁽¹⁾ is referred to. The ruling cited is inapplicable and we consider the Full Bench ruling in *Shera v. The Empress* ⁽²⁾ to be more in point. But even if we may assume that the wall itself was not a building or part of a building in the sense of the term used in Section 436, Indian Penal Code, it is sufficiently clear that appellant in firing the wall knew that the fire would be likely to catch the residential huts in the enclosure, huts in which persons were fast asleep on a winter's night, and so committed the offence described in the section. We affirm the conviction, and having regard to the heinous nature of the offence, its possible consequences and the difficulty of detection, we also affirm the sentence. The appeal is dismissed.

Appeal dismissed.

(1) 57 P. R., 1887, Cr. (2) 35 P. R., 1879, Cr.

No. 8.

Before Mr. Justice Reid and Mr. Justice Harris.

GAME SHAH AND ANOTHER,—PETITIONERS,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Revision No. 972 of 1902.

*Frontier Crimes Regulation (III of 1901)—Applicability of, to the new Mianwali District.**Held, that the provisions of the Frontier Crimes Regulation (III of 1901) in the absence of express repeal or exemption apply to the present Mianwali District.**Petition for revision of the order of Captain A. J. O'Brien, District Magistrate, Mianwali, dated 7th June 1902.*

Oertel, for petitioners.

Government Advocate, for respondent.

The judgment of the Court was delivered by—

5th Feby. 1903.

HARRIS, J. — One Channu Ram appears to have been murdered on the 29th October 1901 in the Bhakhar *tahsil*. That *tahsil* was by Punjab Government Notification No. 995, dated the 17th October 1901, which Notification came into effect on the 9th November 1901, taken away from the Dera Ismail Khan District and incorporated in the new district of Mianwali constituted by the Notification. Certain persons were, after a reference to a Council of Elders by the Deputy Commissioner of Mianwali under Regulation III of 1901, which Regulation came into force on the 18th September 1901, found guilty in connection with the murder and sentenced by that Deputy Commissioner. The Deputy Commissioner noted in his order that "separate proceedings will be taken with regard to Game Shah and Gul Hussain Shah" who are the present petitioners. The Deputy Commissioner has explained, on a reference made to him by this Court, that the proceedings contemplated are under the Regulation, *i.e.*, trial by a Council of Elders.

We are asked as a Criminal Court of revision to set aside the order of the Deputy Commissioner passed with regard to the petitioners on the ground that the Regulation is not in force in the Bhakhar *tahsil* of the Mianwali District.

It is not contended by counsel for the petitioners that this Court has power to revise the order if the Regulation is in force in the Bhakhar *tahsil*. Section 60 of the Regulation is definite

on that point. On the other hand, it is clear that if the Regulation is not in force in that area the order of the Deputy Commissioner is *ultra vires*, and as it would in that case have to be treated as an order passed by the Deputy Commissioner in his capacity as a Magistrate, it would be an order subject to revision by this Court.

Section 1 (3) of the Regulation enacts that the Regulation "extends to the districts of Peshawar, Kohat, Hazara, Bannu, " Dera Ismail Khan and Dera Ghazi Khan; but the Local Government may, by Notification in the local official Gazette, exempt " any local area from the operation of all or any of its provisions."

By Notification of the Government of India of the 26th October 1901 the North-West Frontier Province was created by the separation of certain districts or parts thereof formerly in the Province of the Punjab. The new Mianwali District, constituted by the Punjab Government Notification comprised the Mianwali and Isa Khel *tahsils* of the old Bannu District and the Bhakhar and Leiah *tahsils* of the old Dera Ismail Khan District, and remained in the Province of the Punjab.

It is contended for the petitioners that though at the time Regulation III of 1901 came into force it applied to the whole of the area now included in the new Mianwali District as that district then formed portions of the Bannu and Dera Ismail Khan Districts, the fact that the local limits of those districts were altered subsequently restricted the application of the Regulation to the altered limits, and that the term "Deputy Commissioner" in the Regulation can only mean the Deputy Commissioner of any one of the districts named in the Regulation. It is further urged that the power of exemption given by Section 1 (3) of the Regulation above cited was exercised by the Local Government of the Punjab by the Notification creating the new district of Mianwali.

We are of opinion that in the absence of any express provision, repeal or exemption the Regulation is still in force over the area which was, on the 18th September 1901, covered by the districts named in the Regulation as those districts then existed. It is patent that the separation of the North-West Frontier Province does not affect the question, for if so it would have to be argued that the Regulation is not in force in the Dera Ghazi Khan District, nor could it well be contended that if, as actually happened, the Attock *tahsil* of the Rawalpindi District, in which district the Regulation has not been in force, were joined to the Hazara District the Regulation would be in force in that *tahsil*.

The change in territorial sub-divisions does not appear to us to affect the operation of the Regulation. Thus we find in the preamble to the North-West Frontier Province Law and Justice Regulation, the provision in Section 3 of Government of India Act of 1854 (17 and 18 Vic., c. 77) expressed that when any portion of territory is brought under the immediate control of the Governor-General in Council "no law or regulation in force at any such time as regards any such portion of territory shall be altered or repealed except by law or regulation made by the Governor-General in Council." The General Clauses Act (X of 1897), Sections 6 and 7, shows that repeal must be express and not only implied.

As to the term Deputy Commissioner it is to be observed that it is used in the Regulation without any collocation of the word "district," and in the absence of a definition in the General Clauses Act we understand the office to be one which might attach to any district subsequently formed, as was district Mianwali, out of parts of the area to which the Regulation applied when it came into operation, and it seems to follow that if the Regulation is in force in the Mianwali District the "Deputy Commissioner" of the Regulation would so far as that district is concerned be the Deputy Commissioner of Mianwali.

With regard to the last contention that the power of exemption was exercised by the Local Government by the Act of constituting the new district of Mianwali, it seems only necessary to refer to the words of Notification No. 995. We there find that the sections of the Acts under which the Local Government was exercising powers are specified, but no reference is made to Regulation III of 1901. The purpose of the Notification is thus expressly stated, and had there been any intention to exercise the power of exemption under the Regulation, we are of opinion that such intention would, as indeed was necessary, have been signified by mention of Section 1 (3) of the Regulation.

We thus conclude that Regulation III of 1901 is in force over the area covered by the six districts named in Section 1 (3) of that Regulation as those districts were constituted on the 18th September 1901. *Tahsil* Bhakhar was part of that area, and so the order complained of was one under the Regulation and not *ultra vires*.

We dismiss the petition.

Application dismissed.

No. 9.

Before Sir William Clark, Kt., Chief Judge.

MOTAN DAS—PETITIONER.

Versus

THE EMPEROR—RESPONDENT.

Criminal Revision No. 56 of 1903.

REVISION SIDE,

Excise Act (XII of 1896), Sections 36, 37, 38, 41, 48, 57—Complaint by Collector or Excise Officer—Authority for prosecution—

Held, that a Magistrate is competent to take cognizance of an offence punishable under section 48 of Act XII of 1896 where the case on being reported under Section 41 to the District Magistrate by an officer invested with powers under Sections 36, 37, and 38 of the Act had expressly been made over to him for trial by the District Magistrate who was also the Collector of the District.

Under the provisions of Section 41 of the Act it is not essential for an Excise Officer that he should himself take the person arrested before the Magistrate, it is sufficient compliance with the Act if an accused was with all convenient despatch taken before a Magistrate by the ordinary procedure by which accused are brought before the Magistracy.

Queen-Empress v. Sunilar Singh ⁽¹⁾, *Queen-Empress v. Mukanda* ⁽²⁾, and *Empress v. Chet Singh* ⁽³⁾, cited.

Petition for revision of the order of A. E. Martineau, Esquire, Additional Sessions Judge, Mooltan Division, dated 10th December 1902.

Beechey, for petitioner.

Petman, Assistant Legal Remembrancer, for respondent.

The judgment of the learned Chief Judge was as follows:—

CLARK, C. J.—The accused has been convicted for being in possession, in contravention of rules, of *charas* under Section 48, Act XII of 1896. 18th March 1903.

He was arrested by Sahib Singh, Sergeant Police, on 14th October 1902, who reported the case at the *thana*, Mooltan

⁽¹⁾ 8 P. R., 1901, Cr. ⁽²⁾ I. L. R., XX All., 70.
⁽³⁾ 22 P. R., 1900, Cr.

Cantonment. Harnam Singh, Sergeant of that *thana*, investigated the case and *challaned* it on the 16th October to the District Magistrate through the District Superintendent, Police, and on the 16th October the District Magistrate made the case over for trial to Sardar Sohan Singh, Magistrate.

It is argued on behalf of accused that there was no complaint or report of the Collector or an Excise Officer to give the Magistrate jurisdiction. Though the *challan* was sent for orders to the District Magistrate as such, the order sending the case to Sardar Sohan Singh for trial only bears the initials of the District Magistrate without any designation of his office. As the District Magistrate is the same individual as the Collector, and as the case would be reported to him in the same way by the police, whether as District Magistrate or Collector, I think it would be reasonable to hold that the order was passed by him in his capacity of Collector as well as in his capacity of District Magistrate, and on this ground I would hold that the Magistrate had jurisdiction.

Further I would hold that the Magistrate had jurisdiction under Section 41 of the Act (see *Queen-Empress v. Sundar Singh* ⁽¹⁾, and *Queen-Empress v. Mukanda* ⁽²⁾). It is argued for accused that as it was Sahib Singh who arrested the accused, and as it was not he, but Harnam Singh who *challaned* the accused, the provisions of Section 41 were not complied with so as to give the Magistrate jurisdiction under that section.

It is not denied that both Sahib Singh and Harnam Singh were Excise Officers with power to arrest accused and take him before the Magistrate under Sections 37 and 41 of the Act. As held in *Empress v. Chet Singh* ⁽³⁾, I do not think it was essential that Sahib Singh should himself take the accused before the Magistrate; it would be sufficient compliance with the Act if accused were with all convenient despatch taken before the Magistrate by the ordinary procedure by which accused are brought before the Magistracy, and this was done.

I therefore hold that the Magistrate had jurisdiction to try the case and I dismiss the revision.

Application dismissed.

⁽¹⁾ 8 P. R., 1901, Cr.

⁽²⁾ I. L. R., XX All., 70.

⁽³⁾ 22 P. R., 1900, Cr.

No. 10.

Before Mr. Justice Chatterji.

KARIM BAKHSH,—PETITIONER,

Versus

CRIMINAL SIDE.

HABIBULLA AND ANOTHER,—RESPONDENTS.

Criminal Revision No. 1135 of 1902.

Criminal misappropriation—Partner—Penal Code, Section 405.

Although a partner is authorized to receive money on behalf of the firm and its appropriation to his use is not necessarily criminal, unless it is shown that there was an understanding between the partners that he would not so use it, or that he knew that such money could not upon the state of the firm's accounts fall to his share, but in a case where a partner received money on behalf of the firm and omitted to enter it in the accounts so that the fact of the receipt could not be known to his co-partner, *held*, that such omission, unless duly accounted for, was some proof of an intention by the partner to appropriate partnership assets to himself without the knowledge and consent of his co-partner, which *prima facie* was dishonest, and that his admission when detected and profession to credit the money to his share of profits did not exculpate him.

Semle: There is nothing in law to exempt a partner from a prosecution for criminal breach of trust provided that the ingredients of the offence as defined in Section 405 of the Penal Code can be made out.

Queen-Empress v. Okhoy Coomar Shaw (¹) and *Regina v. Tankard* (²), cited.

Petition for revision of the order of Lala Mul Raj, Magistrate, 1st class, Delhi, dated 26th May 1902.

Beechey and Oertel, for petitioner.

Muhammad Shafi and Shadi Lal, for respondents.

The judgment of the learned Judge was as follows:—

CHATTERJI, J.—This is an application asking for further 23rd March 1903. inquiry in a case in which the accused have been discharged. It is urged, as a preliminary objection, that Section 439, Criminal Procedure Code, under which the application professes to be filed, does not deal with re-inquiry into cases of discharge, but it is clear that Section 437 was intended and the clerical error is

(¹) 13 B. L. R., 307. ¶

(²) L. R., 1 Q. B. (1894), 548.

immaterial. It would not justify my rejecting the application as untenable.

I apprehend that the order that I have really got to revise is that of the Magistrate who discharged the accused. The Sessions Judge's order merely contains his reasons for not granting the petition for further inquiry filed before him, and these reasons cannot be treated as findings, though they are entitled to careful consideration at my hands.

It is claimed for Habibullah that he is a partner in the shop of Elahi Bakhsh, minor, as he has a share in the losses as well as the profits, though none in the capital. The prosecution try to put his status lower, but for the purposes of this application it may be assumed that he is a partner as he is held to be by the two lower Courts. The question then is, whether on that assumption his discharge is justified on the grounds given in the order of the Magistrate. The case for the prosecution is set forth in the order and need not be recapitulated. It need only be noted that, apart from the question of the liability of the accused to a criminal prosecution, the Magistrate does not find it to be unfounded in fact. He finds that the accounts of the firm are very irregularly kept and are incomplete and also that the accused Habibullah realized certain items and kept them with himself without showing them in the books. But he holds that merely for this reason Habibullah cannot be liable to a criminal prosecution when he himself admits the receipt, and that, as he was a partner in the profits and losses to the extent of one-fourth, he could keep the money on account of his share of the profits. The Magistrate also considers that the misappropriation of no particular item is proved against Abdul Wahab and that the case is properly one triable in the Civil Court.

As regards Habibullah, I think the Magistrate was under a misapprehension. There is nothing in law to exempt a partner from a prosecution for criminal breach of trust, provided that the ingredients of the offence as defined in Section 405 can be made out (see *Queen-Empress v. Okhoy Coomarr Shaw* (1), *Regina v. Tankard* (2)). A partner is authorized to receive money on behalf of the firm, and the fact of realization of partnership debts proves nothing against Habibullah. But he received them as trustee for his co-partner and is bound to account for them. His appropriation of the moneys to his own use is also

(1) 13 B. L. R., 307.

(2) L. R., 1 Q. B. (1891), 548.

not necessarily criminal, unless, perhaps, it is shown that there was an understanding between the partners that he would not so use it and he knew that such money could not, upon the state of the firm's accounts, fall to his share. But if he omits to enter the receipt in the accounts so that the fact of the receipt cannot be known to his partner, such omission, unless duly accounted for, is some proof of an intention to appropriate partnership assets to himself without the knowledge and consent of his co-partner, which *prima facie* is dishonest. That Habibullah, when the fact of the receipt became known, admitted it, and professed to credit the money to his share of the profits, does not exculpate him. If the original non-entry in the accounts amounted to concealment the admission when detected, avails nothing. It is not even the case that the money was at once refunded, though this would have made no difference in the guilt of the accused if otherwise made out.

If such an act is not criminal, a partner may privately realize all the partnership assets or remove the whole of the partnership goods and in this way ruin the firm and get off from criminal liability by asserting, when detected, that he took them simply as his share of the capital or profits, though he may not be entitled to a share of the capital and there may be no profit and he himself was fully cognizant of these facts.

Further, the civil liability may be a mere illusion for the assets or money may all be wasted, and the appropriation to the profits or share may be a mere pretence to ward off a criminal prosecution. In other words his mere statement when detected that he took the assets as his own share is not sufficient to show that he is not criminally liable.

I think, therefore, the ground taken by the Magistrate is untenable. Neither the fact that the case may be tried in a Civil Court nor that Habibullah is a partner and admits receipt of the moneys when they are traced to him and professes to have taken them as part of his share of the profits, is sufficient for Habibullah's exculpation if the receipt was improper, secret and dishonest. The Sessions Judge's ground that, as there was no writing defining the duties of the partners, no prosecution is tenable, is equally wrong. It is for the Court to find whether Habibullah—

(1) is a partner or a servant remunerated by profits,

(2) received any specific moneys and misappropriated them dishonestly.

The dishonesty is a matter of inference from the evidence and the circumstances, *e.g.*, whether the non-entry in the account was for good cause and whether the receipt was kept secret from complainant or made known to him, &c. There is apparently no question about appropriation of the money to Habibullah's own use. The understanding, if any, between the partners as to the mode of crediting the receipts, is also material. False entries made in the accounts, if shown to have been made with Habibullah's knowledge, have also an important bearing.

As regards Abdul Wahab, the fact that no specific item is stated to have been taken by him is not sufficient for his discharge if he was the accountant of the firm and custodian of the money. A general deficiency in the account is enough if it is established [see Section 222 (2), Criminal Procedure Code]. The Magistrate came to no distinct finding as to Abdul Wahab's position in the shop and his duties and responsibilities. The Sessions Judge has entirely misapprehended the facts as to the deficiency of the sum of Rs. 2,742 in the assets of the shop. The deficiency occurred prior to 3rd July 1901 and the amount is the balance brought out on the account being made up. This mistake of the Sessions Judge vitiates his opinion altogether. *Dulla v. Queen-Empress* (1) is clearly distinguishable from the present case.

I accept the application and order reinquiry into the charge against the accused as I consider they have been discharged on grounds, that are insufficient and erroneous in law. It must, however, be distinctly understood that I express no opinion whatever as regards their guilt. I have merely discussed the legal questions arising in the case and pointed out the errors in the orders of the Magistrate and the Sessions Judge.

Application allowed.

(1) 2 P. R., 1901, Cr.

No. 11.

Before Mr. Justice Reid and Mr. Justice Anderson.

EMPEROR OF INDIA,—APPELLANT,

Versus

MANGAT,—RESPONDENT.

} APPELLATE SIDE.

Criminal Appeal No. 51 of 1903.

Appeal by Local Government in case of acquittal—Criminal Procedure Code, 1898, Section 417.

Held, that the Chief Court will not interfere with orders of acquittal passed after careful consideration of questions of fact and without any display of incompetence or perversity merely because it might itself sitting as a Court of original jurisdiction has arrived at a different conclusion.

Empress of India v. Gayadin ⁽¹⁾ followed.

Appeal from the order of Sheikh Fakir Ali, Magistrate, 1st Class, Rohtak, dated 8th August 1902.

Turner, Government Advocate, for appellant.

Oertel, for respondent.

The judgment of the Court was delivered by

REID, J.—This is an appeal under Section 417 of the Court 8th June 1903.
of Criminal Procedure from an order of acquittal.

The facts are stated in the judgment of the lower Court.

We see no reason for interference. Although the respondent prevaricated when asked what he had done with the parcel entrusted to him for delivery, and his conduct was suspicious, several apparently respectable and unbiased witnesses for the defence, who were not shaken in cross-examination, told a story which completely cleared him of the charge of criminal breach of trust.

A statement alleged to have been made by the respondent on the 3rd May was not proved, and the delay in making the statement of the 4th May, deposed to by Lala Hazari Lal, was not unnatural, the respondent having been in police custody on the 3rd.

The fact that no part of the covering of the parcel was produced is by no means conclusive. The handkerchief which is the subject of the charge was of small value, the parcel appears to have been in such a form that its contents could be ascertained

⁽¹⁾ *I. L. R.*, IV All., 148.

without unfastening it, and it is extremely probable that it was well known at the Post Office that the Inspector of Post Offices had arrived on special duty.

This Court has adopted the rule laid down in *Empress of India v. Goyadin* ⁽¹⁾, and has not consented to interfere with orders of acquittal, passed after careful consideration of questions of fact and without any display of incompetence or perversity, merely because it might itself, sitting as a Court of original jurisdiction, have arrived at a different conclusion. The Court below has not displayed incompetence or perversity, and has carefully weighed the evidence. We concur in the finding that the evidence for the prosecution is by no means so conclusive as to justify the absolute rejection of the evidence for the defence.

The appeal fails and is dismissed.

No. 12.

Before Mr. Justice Reid.

ALLAH BAKHSH,—APPELLANT,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Appeal No. 495 of 1902.

Criminal Procedure Code, 1898, Section 349—Power of District Magistrates with respect to cases submitted to them under Section 349, Criminal Procedure Code, to inflict severe sentences.

Held, that the powers of a District Magistrate to whom proceedings in a case tried by a second class Magistrate have been submitted with a view to the accused receiving a more severe punishment than the Magistrate trying the case is empowered to inflict are regulated by the proviso to Section 349, Criminal Procedure Code.

Empress v. Begu ⁽²⁾ referred to.

Appeal from the order of Sheikh Asgar Ali, District Magistrate, Muzaffargarh, dated 26th August 1902.

At a preliminary hearing of the appeal in Chambers the following order was recorded by

26th Feb. 1903.

REID, J.—Having considered the evidence on the record the memorandum of appeal and the judgment, I see no reason for interference with the conviction under Section 379 of the Penal Code. The petitioner has throughout admitted that he stole the

⁽¹⁾ *I. L. R.*, IV All., 148. ; ⁽²⁾ 10 P. R., 1881, Cr.

APPELLATE SIDE, }

cup, and, although it is not, in my opinion, established beyond all reasonable doubt that he stole the donkey, the conviction may stand in respect of the cup.

The District Magistrate has, however, overlooked the proviso to Section 349 of the Code of Criminal Procedure, which limits the sentence which he may pass under Section 349 (2) to the extent to which a sentence is limited by Sections 32 and 33 of the Code.

Under Section 46, Act X of 1872, corresponding to Section 349 of the Code now in force, it was held, in *Empress v. Begu* ⁽¹⁾ that a Magistrate of a District could not, "if he "passed a judgment and sentence" under Section 46, exercise his powers under Section 36, corresponding to Sections 30 and 34 of the Code now in force. The course to be pursued by a Magistrate of a District, who thinks a sentence of two years inadequate, is to order a re-trial. Admitted on question of sentence only.

The final judgment of the Chief Court was delivered as follows by

REID, J.—My order of the 26th February 1903 admitting this appeal will be read with this. I see no reason for ordering a new trial. 5th May 1903.

I reduce the sentence passed by the Magistrate of the District to rigorous imprisonment for two years, including solitary confinement for three months.

No. 13.

Before Mr. Justice Reid.

CROWN,—COMPLAINANT,

Versus

GURDITTA AND ANOTHER,—ACCUSED.

Criminal Revision No. 1446 of 1902.

Punjab Municipal Act, 1891, Section 169—Conviction for disobedience of orders of Committee under Chapter VI—"Continuing breach."

The accused having been convicted under Section 169 of the Punjab Municipal Act for not complying with a notice under Section 95 were sentenced to a fine of Rs. 5 each, and in the event of failure to remove the building within a week to pay an additional fine of two annas a day for every day after the week's grace on which the order to remove the building was not complied with.

} REVISION SIDE.

(1) 10 P. R., 1881, Cr.

Heid, that the order as to the payment of a daily fine, after the date of conviction, for failure to comply with the order was bad, as a fine cannot be imposed prospectively. The words "continuing breach" in Section 169 empower a Magistrate to impose a daily fine from the date mentioned in the notice issued by the Committee under Section 95 up to the date of compliance or to the date of conviction, whichever may first occur.

Queen-Empress v. Veerammal ⁽¹⁾ cited.

Case reported by Major G. C. Beadon, Sessions Judge, Jullundur Division, on 17th December 1902.

The facts of the case were as follows:—

A notice under Section 95, Municipal Act, was issued to Gurditta and Bhag to remove an unauthorised building by a certain date.

The accused, on conviction by Sardar Tara Singh, exercising the powers of a Magistrate of the 1st Class in the Jullundur District, were each sentenced, by order dated 4th November 1902, under Section 169 of the Municipal Act, to pay a fine of Rs. 5 and, in the event of failure to remove the building within a week, to pay an additional fine of 2 annas a day for every day after the week's grace.

The proceedings were forwarded for revision on the following grounds:—

A notice under Section 95, Municipal Act, was issued to Gurditta and Bhag to remove an unauthorised building by a certain date.

On conviction of the offence of not complying with this notice the Magistrate sentenced these two persons to be fined Rs. 5 each under Section 169, Municipal Act and, as I understand the order, further directed that, in the event of failure to remove the building within a week, the offenders were to pay an additional fine of 2 annas a day for every day after the week's grace during which the order to remove the building was not complied with.

In my opinion the Magistrate had power to impose a fine not exceeding Rs. 50 for failure to comply with the notice by the date mentioned in the notice and, further, he had power to impose a daily fine not exceeding Rs. 5 per day from the date mentioned in the notice up to the date of compliance with the notice or to the date of conviction, whichever came first, provided that the total fine imposed did not exceed the Magistrate's powers. I am, however, of opinion that the Magistrate could not order the

⁽¹⁾ *I. L. R., XVI Mad., 230.*

payment of a daily fine after the date of conviction for an indefinite period, because (1) at the time of passing sentence there could be no proof of continuing breach after the date of conviction, and (2) the fine for the continuing breach might increase to a sum exceeding the amount of fine which the Magistrate has power to impose.

In case of a continuing breach after the date of conviction it would apparently be open to the Municipal Committee to prosecute again.

For the above reasons I think the Magistrate's order in the present case is illegal, and I accordingly report the case for the orders of the Chief Court.

The present case is in itself of very little importance, and my chief reason for referring it is that the method of awarding fines in the case of a continuing breach is not generally understood and a definite ruling on the point will be useful in future cases.

The judgment of the Chief Court was delivered by

REID, J.—The *dictum* of Best, J., in Criminal Revision 96 of 15th April 1903. 1892, *Queen-Empress v. Veerammal* ⁽¹⁾ is in point.

I concur with the learned Sessions Judge in the view that fine cannot be imposed prospectively. The proper course, as remarked by Best, J., is to institute further prosecution, if there be occasion for it, and allow the accused an opportunity of defending himself before the further fine is imposed. I set aside so much of the order of the Magistrate as imposed a fine for failure to comply with the order for removal after the date of the conviction. That portion of the fine, if realised, will be refunded.

No. 14.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Anderson.

THE CROWN

Versus

NATHU AND OTHERS,—ACCUSED.

Criminal Revision No. 257 of 1903.

Criminal Procedure Code, 1898, Sections 253, 254, 258, 350—Magistrate rehearing evidence for prosecution under proviso (a) to Section 350 where charges were framed by his predecessor—Discharge—Acquittal.

The evidence for the prosecution having been taken before a Magistrate who, after he had framed charges against the accused, ceased

REVISION SIDE.

(1) *I. L. R.*, XVI Mad., 230.

to exercise jurisdiction therein and the case having been then transferred to his successor, the accused demanded that the witnesses for the prosecution should be re-examined. Accordingly the witnesses were re-summoned and after re-hearing the evidence, the second Magistrate discharged the accused.

Held, that the Magistrate's order was erroneous in form. He had no authority to supersede the proceedings of his predecessor or disregard the charge framed, and his order of discharge should therefore be treated as an order of acquittal under Section 258.

Re-hearing of the evidence under proviso (a) to Section 350 of the Code of Criminal Procedure after a charge has been drawn up, amounts to the re-commencement of the trial as distinguished from a re-commencement of the enquiry.

Sadagopacharyar v. Ragavacharyar ⁽¹⁾, *Queen-Empress v. Radhe* ⁽²⁾, and *Kesra Ram v. The Empress* ⁽³⁾ referred to.

Case reported by S. S. Harris, Esquire, Additional District Magistrate, Lahore, on 4th March 1903.

The facts of the case were as follows : —

The accused, on trial by H. S. Williamson, Esquire, exercising the powers of a Magistrate of the 2nd Class in the Lahore District, were discharged by order, dated 22nd January 1903, under Section 253 of the Indian Penal Code.

The proceedings were forwarded for revision on the following grounds :—

Mr. Campbell, Magistrate, 2nd Class, heard the evidence for the prosecution and framed charges under Section 406, Indian Penal Code, against all four accused on 4th November 1902, and fixed the 24th November 1902 for hearing the evidence for the defence. In the meanwhile, Mr. Campbell was transferred, and the case was sent to the Court of Mr. Williamson, Magistrate, 2nd Class. The accused demanded that the prosecution witnesses should be re-heard, the witnesses were accordingly re-summoned and re-heard (with the exception of one witness who did not attend). Mr. Williamson after the re-hearing discharged the accused on 22nd January 1903.

The question is whether this order of "discharge" should not be held to be one of "acquittal."

The charge having once been framed against the accused, the only course open to the Court under Section 258, Indian Penal Code, was either to acquit or convict the accused, unless Section

⁽¹⁾ *I. L. R.*, IX *Mad.*, 282. ⁽²⁾ *I. L. R.*, XII *All.*, 66.
⁽³⁾ 6 *P. R.*, 1884, Cr.

350, Criminal Procedure Code, makes any provision to the contrary. The words used in this section are "or he may re-summon the witnesses and re-commence the inquiry or trial." Does this mean that the charge framed by the previous Magistrate is to be disregarded? In my opinion it does not. A "trial" commences when the charge is framed and the accused claims to be tried (Section 256, Criminal Procedure Code), so the re-commencing of a "trial" means the re-commencing from that stage. Proviso (a) to Section 350, Criminal Procedure Code, allows that in any "trial" the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard. It does not provide that a charge framed by the first Magistrate is to be disregarded by the second.

I have not been able to find any ruling in support of, or against, my view, but it would be of great advantage to have a ruling on the point. These are cases of very frequent occurrence, and the general idea is, that when the second Magistrate re-summons the witnesses even in a "trial" that he is at liberty to disregard the charge framed by the first Magistrate, and if he is of opinion that no *prima facie* case has been made out, that he can discharge the accused.

It is obviously unfair to the accused to be discharged when he should be acquitted.

In the present case the accused have been discharged, whereas they should have been acquitted. The complainant Mahi has applied for revision of the orders of discharge, but this application can best be disposed of after it is decided whether Mr. Williamson's order is one of discharge or acquittal. I therefore, under Section 438, Criminal Procedure Code, report the case for orders of the Chief Court of the Punjab.

The judgment of the Chief Court was delivered by

ANDERSON, J.—This is a reference by the Additional District Magistrate, Lahore, for orders under Section 438, Criminal Procedure Code. 15th May 1903.

A 2nd Class Magistrate, after hearing evidence, framed charges against several persons, under Section 406, Indian Penal Code, and called on them to produce evidence to clear themselves. That Magistrate was transferred, and the case went before another 2nd Class Magistrate. The accused, availing themselves of the privilege allowed by Section 350 of the Code, demanded that the

prosecution witnesses should be re-summoned and re-heard. The Magistrate then hearing the case complied, very properly, with their request, re-heard the evidence and reached the conclusion that there had never been a case against more than one of the accused, namely Sohni, and that a very weak one which would not warrant conviction. He then passed an order *discharging* all the accused.

The Additional District Magistrate is of opinion, with reference to the provisions of Section 258, Criminal Procedure Code, that as a charge had been framed, the only order which the Magistrate hearing the case could pass was one convicting or acquitting the accused, and that the Magistrate's order should be treated as one of acquittal. The matter has become further complicated as the original complainant has made an application before the Additional District Magistrate that the order of discharge should be revised and further enquiry ordered.

After referring to the text of Section 350, Criminal Procedure Code, our view is, that the intention of the legislature was merely to give the accused the privilege of obliging the Magistrate, who would finally dispose of the case, to hear with his own ears all evidence produced for the prosecution and to form his own opinion on it, but not to give him the power of a superior Court as defined in clause (b) of Section 423, Criminal Procedure Code, of ordering a re-trial, so to speak.

If the case has gone so far that a charge has been drawn up we should be disposed to hold that the second Magistrate cannot treat the charge as non-existent although he himself decide to acquit on the same evidence.

If the case has not proceeded so far as the imposition of a charge no great difficulty can arise. The proceedings then would, probably, amount only to an enquiry, yet in *Sulagopacharyar v. Ragavacharyar* ⁽¹⁾ it was held that when a Magistrate took up a case heard by a predecessor which had proceeded only thus far, he was not justified in doing anything further than re-hear evidence and could not refer the complaint to the police for enquiry and report. In *Queen-Empriss v. Radhe* ⁽²⁾ Straight, J., remarked that Section 350, Criminal Procedure Code, is intended to provide for a case when an enquiry or trial has been commenced before one incumbent of a particular magisterial post and that officer ceases to exercise jurisdiction and is succeeded by another officer. The circumstances of that case were some-

(1) I. L. R., IX Mad., 282.

(2) I. L. R., XII All., 60.

what different. A conviction by a District Magistrate who had disposed of a case referred to him by a 3rd Class Magistrate without an explicit request to take up the case, because he could not pass a sufficiently severe sentence, was quashed, and the provisions of Section 350 were held not applicable, though the District Magistrate had said, in his judgment, that he took up the case under Section 349 of the Code, clause 2 of which gives the option of recalling witnesses. *Kesra Ram v. The Empress* (1), also rules that the proceedings of a predecessor in office are not superseded, and a Magistrate pronouncing judgment on a record completed before he took over the case was held competent to do so, although there had been some irregularity in his procedure in not having the accused brought before him to ascertain whether they desired to exercise the right reserved to them under proviso (a) to Section 350 of the Criminal Procedure Code.

In the present case we should be disposed to hold that, when the accused requested that the prosecution witnesses should be re-summoned and the Magistrate acceded to this request, he should be held to have recommenced the trial as distinguished from the enquiry, and that any order passed by him after considering such evidence as he had before him, if not an order of conviction, must be taken to be an order of acquittal. Moreover, a perusal of the evidence itself leads to the conclusion that the case did not deserve to succeed.

We direct in revision that the order passed by Mr. Williamson, Magistrate, 2nd Class, on 22nd January 1903, be held to be an order of acquittal instead of an order of discharge.

No. 15.

*Before Sir William Clark, Kt., Chief Judge,
and Mr. Justice Reid.*

THE EMPEROR,—APPELLANT,

Versus

JANAN AND OTHERS,—RESPONDENTS.

Criminal Appeal No. 605 of 1902.

Frontier Crimes Regulation, 1901, Section 15—Motion by Public Prosecutor in view to a reference to Council of Elders—Time for exercising such power—Instructions by telegram from a Deputy Commissioner to a Public Prosecutor.

After the trial of a Sessions case had been completed with the exception of hearing the arguments, the Public Prosecutor produced a

} APPELLATE SIDE.

(1) 6, P. R., 1884, Cr.

telegram addressed to him purporting to have been sent by the Deputy Commissioner and withdrew the case from the Court in order that it might be referred to a Council of Elders under the Frontier Crimes Regulation of 1901. The Sessions Judge refused to stay proceedings on the ground that the Public Prosecutor had not been instructed in writing by the Deputy Commissioner, he being of the opinion that the telegram could not be called a written instruction within the meaning of Section 15 (1) of the Regulation; he also doubted the authority of the Deputy Commissioner of withdrawing the case under the Regulation at that stage.

Held, that the Sessions Judge was wrong in refusing to stay proceedings. The object of sub-section (1) of section 15 is only to ensure definite instructions which might be obtained by a telegram. It is not necessary that such instructions ought to be in the handwriting of, or signed by, the Deputy Commissioner.

Although it is an inconvenient and improper procedure for a Public Prosecutor not to withdraw until the case is completed, yet the section being imperative a Sessions Judge is bound to stay proceedings as soon as the Public Prosecutor is instructed to withdraw from the prosecution at any time before an order of conviction or acquittal has been made.

Appeal from the order of Maulvi Inam Ali, Sessions Judge, Mooltan Division, dated 10th July 1902.

Turner, Government Advocate, for appellant.

Oertel and O'Gorman, for respondents.

The judgment of the Court was delivered by

23rd June 1903.

CLARK, C. J.—After the trial of a Sessions case had been completed, all except the hearing of the arguments, the Public Prosecutor, under Section 15 (i) of the Frontier Crimes Regulation No. III of 1901, withdrew from the prosecution of Sadar and Khuda Bakhsh, in order that the case might be referred to a Council of Elders.

The Sessions Judge refused to stay proceedings, on the ground that the Public Prosecutor had not been instructed in writing by the Deputy Commissioner, and that the instructions as regards one of the accused, named him as Haidar, while his real name was Sadar. This was on 9th July 1902, and he acquitted the three prisoners on 10th July 1902.

Government has appealed against the acquittal, and the first question is whether the Public Prosecutor was instructed by the Deputy Commissioner in writing to withdraw.

The Public Prosecutor had in his possession the following telegram: "I authorize you to withdraw the case against Khuda Bakhsh and Haidar."

The case was a Dera Ghazi Khan case, and was being tried by the Sessions Judge at Mooltan (with permission). If the case had been tried at Dera Ghazi Khan, as it should in the ordinary course, no doubt this difficulty would not have arisen.

In our opinion the wording of the section is wide enough to include instructions by telegram from a Deputy Commissioner to a Public Prosecutor, and a Deputy Commissioner who instructs a Public Prosecutor by telegram instructs him in writing, the message is delivered in writing, and the object of the section is no doubt to ensure definite instructions, and this is obtained by a telegram. If the Sessions Judge entertained any doubt on the subject, he should have adjourned the case to remove the doubt.

At the same time it is an inconvenient and improper procedure for the Public Prosecutor not to withdraw, until the case is completed, if he might equally well have withdrawn at the commencement of the trial. The section seems to apply to cases where something unexpected occurs at the trial, as where the witnesses turn round from their previous statements.

The section, however, is imperative that the Sessions Judge shall stay proceedings.

As regards the mistake of the name of Haidar for Sadar in the telegram, this was an obvious clerical error, and though the Public Prosecutor should have had this corrected, yet, as he had not done so, the Sessions Judge should have given time for the purpose.

The error does not occur in the written instruction of 10th July, which followed the telegram, where Khuda Bakhsh and Sadar are correctly named.

We therefore accept the appeal and set aside the orders of the Sessions Judge of 9th and 10th July 1902, as far as regards Sadar and Khuda Bakhsh, and direct stay of proceedings in the Sessions Court from 9th July 1902 as far as they are concerned.

The acquittal of Janan will stand.

Appeal allowed.

No. 16.

Before Sir William Clark, Kt., Chief Judge, and
Mr. Justice Reid.

SAJJAD HUSSAIN,—APPELLANT,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Appeal No. 238 of 1903.

APPELLATE SIDE, }

Confession—Value of, subsequently retracted—Corroboration—Admissibility of such confession without corroborative evidence.

Held, following *Queen-Empress v. Raman* ⁽¹⁾, that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. It is sufficient for his conviction without corroborative evidence notwithstanding a subsequent denial. The weight to be given to such a confession must depend upon the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for his retraction.

Queen-Empress v. Maiku Lal ⁽²⁾, *Crown v. Mussamat Fairce* ⁽³⁾ and *Ratti Ram v. Queen-Empress* ⁽⁴⁾ referred to.

Appeal from the order of S. Clifford, Esquire, Sessions Judge, Delhi Division, dated 29th April 1903.

Muhammad Shafi, for appellant.

Government Advocate, for respondent.

6th July 1903.

REID, J.—The appellant has been sentenced to transportation for life for the murder, on the 21st January 1903, of Mussamat Bhagwani, aged about 30, wife of Harnam, a barber.

The medical evidence satisfies us that the woman was murdered, her throat having been cut, from ear to ear, to the spinal cord. There were also a cut about an inch long on the throat, below the fatal wound, a superficial wound on the abdomen and three cuts on the hands. Harnam reported to the police at 11 P. M. on the 22nd January that he had gone to Karnal on the morning of the 21st leaving his wife at home, and returned on the evening of the 22nd to find his house locked, and that, after he had had the lock forced open, he found his wife in the house dead.

On the 27th January the appellant, a Sayad, aged 30, son of a Risaldar, confessed to a Magistrate of the 1st Class that he

⁽¹⁾ *I. L. R.*, XXI *Mad.*, 83.

⁽²⁾ *I. L. R.*, XX *All.*, 133.

⁽³⁾ 21 *P. R.*, 1809, Cr.

⁽⁴⁾ 7 *P. R.*, 1899, Cr.

had murdered Mussammat Bhagwani, with whom he had had an intrigue for some years, because he suspected her of renewing an old intrigue with Wilait Ali, and she had foully abused him, when he taxed her with being unfaithful to him.

This confession was withdrawn before the appellant was charged by the Committing Magistrate on the 27th March, but the Committing Magistrate has committed the error, so common among Magistrates in this Province, of not dating the appellant's statement.

The confession bears intrinsic marks of being genuine, and we see no reason to doubt that it was made voluntarily. After confessing the appellant appears to have been sent to the judicial lock-up, so that he was not relegated to the custody of the police, as suggested by his counsel.

We see no reason for rejecting the evidence of Wilait Ali and Husain, who deposed that they saw the appellant and Mussammat Bhagwani together on the 21st January at Harnam's house, and that Wilait Ali left a message with the woman for Harnam. On this latter point there is an apparent contradiction between their evidence and the confession, in which it was stated that Mussammat Bhagwani refused to listen to what Wilait Ali wanted to say to her and that he then went away, but the confession was not specially to the effect that Wilait Ali did not tell the woman to deliver a message to her husband, and the witnesses deposed that she merely said that her husband had gone to Kaithal. We attach no importance to this possible contradiction, on which counsel for the appellant has laid much stress. The evidence on the record satisfies us that an intrigue between the appellant and the murdered woman existed, and we see no force in the suggestion that Harnam murdered her. The defence had an opportunity of contradicting Harnam as to his reason for going to Kaithal, and the same remark applies to the contention that a number of people mentioned in the confession have not been called to corroborate it.

Their names having been mentioned, they might, and have not, been called to contradict the confession.

As we have found that the confession has been corroborated, it is unnecessary to deal at any length with the contention that a conviction cannot be based on an uncorroborated confession. In our opinion an uncorroborated confession may be accepted, and we concur with Collins, C. J., and Shephard, J., who held in

Queen-Empress v. Raman ⁽¹⁾, that “the weight to be given to a retracted confession must depend upon the circumstances under which the confession was originally given and the circumstances under which it was retracted, including the reasons given by the prisoner for his retractation,” and that “it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence.”

Queen-Empress v. Maiku Lal ⁽²⁾ is to the same effect, and *Crown v. Mussammat Paires* ⁽³⁾, and *Ratti Ram v. Queen-Empress* ⁽⁴⁾, cited for the appellant are not in conflict, inasmuch as they deal with the peculiar circumstances of each case.

The reasons given by the appellant for retraction are of the description so commonly alleged by prisoners who have profited by the advice of other prisoners in jail or lock-up, and the evidence for the defence is worthless. It is not difficult for a Sayad, son of a Risaldar, to induce four witnesses to support such an *alibi*, as that set up by the appellant, and such a man would not be a good subject for ill-treatment by the police.

We are satisfied that the appellant murdered Mussammat Bhagwani, and we concur with the learned Sessions Judge in holding that he acted under provocation, which was considerable, though not grave and sudden, within the terms of Section 300, exception I, of the Penal Code.

We dismiss the appeal.

Appeal dismissed.

No. 17.

Before Sir William Clark, Kt., Chief Judge.

SINGHARA,—APPELLANT,

Versus

THE KING-EMPEROR,—RESPONDENT.

Criminal Appeal No. 179 of 1903.

Misjoinder of charges—Joint trial for distinct offences—Irregularity—Criminal Procedure Code, 1898, Sections 233, 239 and 537.

Misjoinder of charges and joint trial of more than one person for distinct offences committed in different transactions are opposed to

⁽¹⁾ *I. L. R.*, XXI *Mad.*, 83.

⁽²⁾ *I. L. R.*, XX *All.*, 133.

⁽³⁾ 21 *P. R.*, 1869, Cr.

⁽⁴⁾ 7 *P. R.*, 1899, Cr.

Sections 233 and 239 of the Code of Criminal Procedure and are illegalities and not mere irregularities curable by Section 537.

Semle.—The offences of theft and receiving stolen property when the two transactions are unconnected are distinct offences and should not be jointly tried.

Subrahmanya Ayyar v. King-Emperor (') cited.

Appeal from the order of Sheikh Asghar Ali, District Magistrate, Muzaffargarh, dated 19th February 1903.

The judgment of the learned Chief Judge was as follows:—

CLARK, C. J.—The facts of this case are briefly these— 12th June 1903.

On 29th November 1902 Chuhan, accused 1, was found in Shahr Sultan, Muzaffargarh District, trying to sell a girl, Mussammat Kasto.

Mussammat Kasto was questioned and her history followed up. It appeared that she was the wife of one Bhukku, a Megh (low caste), a resident of Jammu State, and she had left him in the end of the year 1900, and then she went and lived with the brothers Gudar and Singhara, accused 2 and 3 for several months; then about July 1901 these two men took her to Neh in Bahawalpur and sold her to Killu (brother of accused Chuhan). Killu married her, and subsequently died, then Chuhan took possession of her, but getting tired of her, was trying to sell her on 29th November 1902.

The District Magistrate at one and the same trial has convicted accused 2 and 3, under Section 368, Indian Penal Code, of wrongfully concealing or keeping in confinement a kidnapped girl, and accused 1, under Section 419, Indian Penal Code, of cheating by personation.

Assuming Mussammat Kasto to have been 15 years of age when she left her husband some two years ago, the first question is whether she was kidnapped; there is no evidence of this. Her own statement is that her husband turned her out, and she went and lived elsewhere, and finally one Lahnu met her in Jammu, and kept her in Jammu for half a month, and then made her over to the accused Gudar and Singhara.

Her husband, Bhukku, only says that she went out to pick *sag* one day, and did not return, and he searched for her unsuccessfully.

Mussammat Kasto was at the time some 15 years of age, had been living as wife with her husband, and may well have had the appearance of an adult woman.

There is, in the first place, no proof that she was kidnapped, and, in the second place, if she was kidnapped, there is no proof that Gudar and Singhara knew that she was kidnapped.

There is further no reason to suppose that she did not voluntarily and openly live with Gudar and Singhara.

The case against these two accused under Section 368, Indian Penal Code, therefore absolutely breaks down.

As regards Chuhar there is clearly no case under Section 419, Indian Penal Code, it was not personating for Chuhar to describe the woman as a Kirari, when she was a Megh. To constitute personation under the section, he must have represented her to be *some person* other than she really was.

As regards the question whether he committed cheating under Section 417, Indian Penal Code, the elements of the offence are not at all made out. It is not clear that Chuhar knew that the woman was not a Kirari, and if he did, he was only *offering* to sell her as such—he came to no terms with Dhannu, and if Dhannu went to Neh to make enquiries, it cannot be said that Chuhar intentionally induced Dhannu to go to Neh to make enquiries, this would probably be the last thing Chuhar wanted; the case does not come within the definition of cheating.

No offences have been proved, and if they have been proved, the whole proceedings would have to be set aside for misjoinder of charges for two reasons—

- (1) Under Section 233, Criminal Procedure Code, and subsequent sections the charges framed could not be tried together.
- (2) Under Section 239, Criminal Procedure Code, the accused could not be charged jointly.

It is most important that the subordinate Court should strictly observe the provisions of the above sections as to framing of charges, for the Privy Council have held that any violation of the law on this subject is more than a mere irregularity, and cannot be remedied by Section 537, Criminal Procedure Code, but that the conviction must be set aside. *Subrahmanya Ayyar v. King-Emperor* (1).

(1) *I. L. R.*, XXV *Mad.*, 61, P. C.

Three offences of the same kind within one year may be charged together, Section 234. More than one offence can be tried at one trial, if they form part of the same transaction, also offences falling within two definitions, and acts constituting one offence, but constituting, when combined, a different offence, Section 235. Where it is doubtful what offence has been committed by a single act or series of acts, the accused may be charged with all or any of such offences, or in the alternative, Section 236. Except in these cases, there must be a separate charge for every distinct offence and such charges must be tried separately, Section 233.

Section 239 deals with *what person may be jointly charged*, it is against this section that Courts so often offend, it is only when more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing any offence, and another of abetment of or attempt to commit such offence, that they can be charged and tried together.

The words "same transaction" require careful consideration. In this case the concealing of the girl by accused 2 and 3 could by no possibility be considered as part of the same transaction as accused 3's trying to sell her 1½ years afterwards.

Similarly, persons are often charged together for stealing and receiving stolen property, though the two transactions are unconnected. In such cases the whole proceedings have to be set aside. Notice.

On the final hearing the learned Chief Judge accepted the appeal and acquitted and discharged all three accused.

No. 18.

Before Sir William Clark, Kt., Chief Judge.

CROWN

Versus

ISMAIL AND OTHERS.

} REVISION SIDE.

Criminal Revision No. 821 of 1903.

Compensation—False case—Imprisonment in default of payment of compensation—Criminal Procedure Code, 1898, Section 250.

Held, that as a case which is wilfully false is necessarily vexatious, a Magistrate is competent to order the complainant to pay compensation to the accused under Section 250 for bringing a false charge, but an order

of imprisonment under the second proviso of Section 250 can only be passed after failure to recover the compensation as a fine.

Parsi Hajra v. Bandhi Dhanuk ⁽¹⁾, *Emperor v. Asha* ⁽²⁾ and *Bachu Lal v. Jagdam Sahai* ⁽³⁾ referred to.

*Case reported by W. A. LeRossignal, Esquire, Sessions Judge,
Ferozepore Division, on 27th July 1903.*

The facts of this case were as follows:—

The accused were discharged and acquitted by order of A. W. J. Talbot, Esquire, C. S., exercising the powers of a Magistrate of the 1st class in the Hissar District, dated the 24th June 1903, and the complainant was directed to pay each of the accused Rs. 15 as compensation under Section 250, Criminal Procedure Code.

The proceedings were forwarded for revision on the following grounds:—

The applicant was in this case ordered by the Magistrate to pay Rs. 15 to each of 5 accused, or Rs. 75 in all, as compensation, on the ground that the charge he had brought against them was false.

Compensation is awardable only when the charge is vexatious or frivolous, and though possibly the Magistrate held the case to fall within this category he has not said so.

Another more serious defect is that the Magistrate first wrote his order of compensation and subsequently asked the accused to show cause, whilst a third error lay in that he ordered accused to undergo imprisonment in default of payment of the compensation.

For these reasons I recommend that the order of compensation be cancelled.

The judgment of the Chief Court was delivered by

21st Aug. 1903.

CLARK, C. J.—A case, which is wilfully false, is necessarily vexatious, and I do not see why Section 250, Criminal Procedure Code, should not be applied.

As regards *Parsi Hajra v. Bandhi Dhanuk* ⁽¹⁾ and *Emperor v. Asha* ⁽²⁾, both judgments appear to treat the words in Section 250, Criminal Procedure Code, as “frivolous and “vexatious,” whereas they are “frivolous or vexatious.”

The Calcutta case was not “altogether false” and the Bombay case was not “wilfully false.” This case was apparently altogether and wilfully false in the Magistrate’s opinion.

⁽¹⁾ I. L. R. XXVIII Calc., 251 ⁽²⁾ 4 Bom., L. R., 645.
⁽³⁾ I. L. R., XXVI Calc., 181.

In the Bombay ruling a Full Bench Calcutta ruling is referred to, in which it was held that a false case may also be vexatious within the meaning of Section 250, Criminal Procedure Code. The case is not quoted, and I have not been able to trace it.

Bachu Lal v. Jaydam Sahai ⁽¹⁾ appears to hold that compensation may be awarded under Section 250, Criminal Procedure Code, in false cases.

The order awarding compensation is, therefore, legal, and there is no ground for revising that part of the order. Complainant was heard as to his objection to the order and no valid objection was put forward. The order of simple imprisonment is illegal, that can only be passed after failure to recover the compensation as a fine, that part of the order is set aside.

No. 19.

*Before Sir William Clark, Kt., Chief Judge,
and Mr. Justice Robertson.*

MUSSAMMAT GHULAM RAKIYA,—COMPLAINANT,

Versus

NIAZ ALI,—ACCUSED.

} REVISION SIDE.

Criminal Revision No. 752 of 1903.

*Maintenance of wife—Pardanashin lady—Personal attendance in Court
—Discretion—Criminal Procedure Code, 1898, Section 488.*

Held, that a Magistrate has discretion in the case of an application under Section 488, Criminal Procedure Code, to dispense with the personal attendance of the complainant when she is a *pardanashin* lady. There is nothing in the section which requires the personal attendance of the person in whose favour the order for the maintenance is to be made.

Bishen Das v. Mussammat Nanaki ⁽¹⁾, *Hildephonsus v. Malone* ⁽²⁾, *In the matter of the petition of Farid-un-nissa* ⁽³⁾, *In the matter of the petition of Basant Bibi* ⁽⁴⁾, *In the matter of the Petition of Din Tarini Debi* ⁽⁵⁾, *Basumoti Adhikarini v. Budram Kalita* ⁽⁶⁾, and *Nur Mahomed v. Bismulla Jan* ⁽⁷⁾, referred to.

Shadi Lal for petitioner.

⁽¹⁾ I. L. R., XXVI Calc., 181.

⁽²⁾ 3 P. R., 1893, Cr.

⁽³⁾ 13 P. R., 1885, Cr.

⁽⁴⁾ I. L. R., V All., 92.

⁽⁵⁾ I. L. R., XII All., 69.

⁽⁶⁾ I. L. R., XV Calc., 775.

⁽⁷⁾ I. L. R., XXI Calc., 588.

⁽⁸⁾ I. L. R., XVI Calc., 781.

*Case reported by C. W. Loxton, Esquire, District Magistrate,
Gujrat, on 14th July 1903.*

The proceedings were forwarded by the learned District Magistrate for revision on the following grounds:—

Applicant is a *pardanashin* lady who applied for an order against her husband under Section 488, Criminal Procedure Code. She also applied to the lower Court for exemption from personal appearance. The lower Court's opinion being that it was necessary to take complainant's statement as a preliminary to the issue of process dismissed the application. The result of this order has been that the case has come to a dead cessation.

My personal opinion is that the application is not a "complaint," and that the procedure laid down in Section 200—Section 203, Criminal Procedure Code, does not apply. The proceedings are of a civil nature, and I think the lower Court should have issued notice to the opposite party. I am also inclined to think that applicant should have been allowed to appear by pleader as she might have done in a civil suit.

The question is under what section of the Criminal Procedure Code or otherwise was the present application filed. The Magistrate does not mention Section 203, Criminal Procedure Code. If the application was dismissed under this section the District Magistrate might himself order a re-trial. But I am extremely doubtful whether Section 203, Criminal Procedure Code, applies to the present case, and it being my opinion that process should have issued against the husband, I send up the case for orders on the Revision side to the Chief Court.

The judgment of the Chief Court was delivered by

17th Aug. 1903.

ROBERTSON, J.—The only point, which it is necessary for us to decide in this reference, is whether, when an application is made under Section 488, Criminal Procedure Code, by a wife, who is also a *pardanashin* lady, against her husband, for maintenance, the Magistrate, to whom such application is made, is competent to dispense with the personal attendance of the *pardanashin* lady applicant.

In the case before us one Mussammat Ghulam Rakiya, a *pardanashin* lady, made an application against her husband Niaz Ali, under Section 488, Criminal Procedure Code, for maintenance, on 18th May 1903. On 21st May 1903 she applied for permission to appear by pleader and to have her personal attendance at Court dispensed with.

This last application is the only one which has been disposed of so far, and the petition has been dismissed. The Magistrate remarks:—

"Section 200 provides the procedure to be observed when a complaint as to an offence is presented, but there is no provision for applications which could not be termed complaints."

The Magistrate, we think, is clearly right in holding that an application under Section 488 is not a "complaint."

The definition of a "complaint" is given at Section 4 (*h*) and means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person has committed an offence, and "offence" under Section 4 (*o*) is defined to mean any act or omission made punishable by any law for the time being in force.

And in Section 488 itself, paragraph (8), the word "application" is used and not "complaint." We think it is clear, therefore, that an application under Section 488 is not a complaint, and this is the view taken in *Bishen Das v. Mussammat Nanaki* (¹) by two learned Judges of this Court, and also in *Hildephonsus v. Malone* (²).

The Magistrate, however, appears to consider that Section 488 (6) provides that the procedure in hearing an application under Section 488, Criminal Procedure Code, shall be the same as in the trial of summons cases. But this is not what is laid down in Section 488 (6) ; all that is stated there is that all evidence under this chapter shall be recorded in the manner prescribed in the case of summons cases. This refers back to Section 355, which prescribes that a memorandum of the substance of the evidence of each witness shall be made as the examination proceeds, in contradistinction to the provision of Section 356, which prescribes a different manner for the record of the evidence in other cases, Section 488 *et seq.* provides for the procedure to be followed.

So far we have cleared the ground. It does not appear, however, that there is any specific provision in the Code of Criminal Procedure regarding the exemption of *pardanashin* ladies from personal attendance. It was pointed out by Flowden, J., in *Hassan Khan v. The Empress* (³), that the "inconvenience" noted in Section 503 of the Criminal Procedure Code is not inconvenience to the witness merely, but inconvenience which comports with the other terms of the section. With this view we concur. In that case certain proceedings for maintaining the *pardah* of a lady-witness, while present in Court, were approved of. The same view was taken to a considerable extent in *The matter of the Petition of Farid-un-nissa* (⁴). Exemption from attendance

(¹) 3 P. R., 1893, Cr.

(²) 13 P. R., 1885, Cr.

(³) 41 P. R., 1887, Cr.

(⁴) I. L. R., V All., 92.

was refused to a *pardanashin* lady complainant, but sanction given to special arrangements to secure her privacy, and the same views were enunciated in *The matter of the Petition of Basant Bibi* ⁽¹⁾. In the cases reported in *The matter of the Petition of Din Tarini Debi* ⁽²⁾, there were special circumstances, which induced the Court to allow a *pardanashin* lady to be examined at her own house by commission, one of which was that the defence did not insist on her examination in open Court. In *Basumoti Adhikarini v. Budram Kalita* ⁽³⁾ it was laid down that in the case of an accused *pardanashin* lady, if a summons be first issued, under Section 205, Criminal Procedure Code, her appearance might be dispensed with.

From these cases it will be seen that, even in the investigation of strictly criminal cases, although it cannot be held now that any *pardanashin* lady can claim exemption from personal attendance as of right, it has been held that in special cases such an exemption may be allowed. In *Nur Mohamed v. Bismalla Jan* ⁽⁴⁾ bastardy proceedings under Section 488 were held to be *quasi-civil* proceedings.

It appears to us on a full consideration of the principles which should govern the matter, that a Magistrate has discretion in the case of an application under Section 488, Criminal Procedure Code, to dispense with the personal attendance of the complainant, when she is a *pardanashin* lady. We have pointed out above that such an application is not a complaint, and that it is not laid down that the whole procedure is to be that of a summons case, and the section itself recites in the first paragraph that the Magistrate may give relief upon "proof" of such neglect or refusal. Very obviously in regard to one class of cases coming under Section 488, *i.e.*, the case of an infant child, it is not intended to insist on the personal attendance of the person in whose favour the order is to be made, and there is nothing in the section which requires it. The personal attendance of the person in whose favour the order is to be made is nowhere laid down in the section, and the exemption from personal attendance, even of the person against whom the application is made, is specifically provided for in Section 488 (6). Of course an applicant absenting herself may run a greater risk of having her application dismissed, but that is a different matter for her own consideration.

(1) I. L. R., XII All., 69.

(2) I. L. R., XV Cal., 775.

(3) I. L. R., XXI Cal., 588.

(4) I. L. R., XVI Cal., 781.

Upon all the considerations noted above we hold that the Magistrate in this case has the discretion to exempt the applicant, who is a *pardanashin* lady, from personal attendance in Court, and we accordingly set aside his order, clearly passed under the misapprehension that he had no such discretion, and return the application to the Magistrate for disposal, without offering any opinion on its merits.

No. 20.

Before Sir William Clark, Kt., Chief Judge.

CROWN

Versus

MULA AND ANOTHER,—ACCUSED.

} REVISION SIDE.

Criminal Revision No. 440 of 1903.

Lambardars—Omission of lambardars to report absence of bad character from their village—Punjab Laws Act, 1872, Section 39 A, Rule 19.

The obligation imposed upon village headman and watchman by Rule 19 of the rules under Act IV of 1872 is a collective and not an individual duty on each headman and watchman, and therefore where the prescribed information of the absence of a bad character had been given by the village watchman, the lambardars could not be punished for breach of the rule, as the duty imposed by law had been discharged.

Case reported by T. J. Kennedy, Esquire, Sessions Judge, Umballa Division, on 20th April 1903.

The facts of this case were as follows:—

Raja Ram, *badmash*, Register No. 10, resident of Muzafat Kalan, *tahsil* Jagadhri, absented himself without permission, the fact was duly reported by the village watchman. Befor the Tahsildar the watchman said he was directed to do so by the village headmen, but before the Magistrate he stated he had gone to report the matter of his own accord.

The accused (village headmen), on conviction by M. Harrison, Esquire, Assistant Commissioner, exercising the powers of a Magistrate of the 1st class in the Umballa District, was sentenced, by order, dated 7th March 1903, under Section 44 of rules under Act IV of 1872, to pay a fine of Rs. 5 each, or, in default, to undergo one week's simple imprisonment.

The proceedings were forwarded for revision on the following grounds:—

1. The applicants on the facts found by the Magistrate had not been guilty of any offence.

2. Rule 19 of the rules under Act IV of 1872, the breach of which is punishable under rule 44, prescribes that every village headman and village watchman shall give timely intimation in the event of any notorious bad character being absent at night, without having given notice of his

departure, and rule 32 of the rules prescribes that this duty in regard to furnishing information to the police, shall, ordinarily, be performed by village headmen, through the agency of the village watchmen. In the present instance, the prescribed information of the absence of Raja Ram was given, by the village watchman. It is immaterial whether, as originally stated by the village watchman before the Taksildar, he was ordered to give the information by the headmen, as was probably the truth, or whether he went and gave the information *proprio motu*. When information was duly given, the duty imposed by law, which was a collective duty and not an individual duty imposed on each headman and watchman, was discharged, and the lambardars cannot be punished for breach of the rules.

3. I recommend that the convictions be quashed and the fines remitted and refunded.

The opinion of the Chief Court was delivered by

23rd July 1903.

CLARK, C. J.—Conviction quashed and fine remitted for reasons given by the Sessions Judge.

No. 21.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Anderson.

JIWAN AND OTHERS,—APPELLANTS,

Versus

THE EMPEROR—RESPONDENT.

Criminal Appeal No. 289 of 1903.

Forfeiture of property—Penal Code, Section 62.

The sentence of forfeiture of property should not be inflicted where an accused does not possess any property worth mentioning. Forfeiture in such cases means very little and creates much annoyance and trouble to both accused's family and Government officials with no corresponding benefit. Before passing orders as to forfeiture of property, the position and means of accused should therefore be taken into consideration.

McDonald, for appellants.

Government Advocate, for respondent.

The judgment of the Court (so far as is material for the purposes of this report) was delivered by

27th July 1913.

CLARK, C. J.—The order of forfeiture of property is, in our opinion, inappropriate. The three first accused are Kashmiris, and the other two accused are low people, and apparently none of them have any property worth mentioning. The father of accused 1, 2, a *chaukidar*, is alive.

APPELLATE SIDE. }

Forfeiture of property in such case means very little and creates much annoyance to accused's families, and trouble to Government officials, with little or no corresponding benefit. Before passing orders as to forfeiture of property, the position and means of the accused should along with other matters be taken into consideration.

We, therefore, set aside the order of forfeiture, but otherwise dismiss the appeal.

No. 22.

*Before Sir William Clark, Kt., Chief Judge, and Mr.
Justice Anderson.*

CROWN,—APPELLANT,

Versus

NEK MUHAMMAD,—RESPONDENT.

Criminal Appeal No. 273 of 1903.

Public servant unlawfully engaging in trade—Penal Code, Section 168.

Held, that lending money on interest does not amount to "Unlawfully engaging in trade" within the meaning of Section 168 of the Penal Code.

H. H. The Maharaja of Kashmir v. Mohan Lal ⁽¹⁾ and *Hall v. Franklin* ⁽²⁾, referred to.

Appeal from the order of Lala Sansar Chand, Magistrate, 1st class, Jhelum, dated 16th December 1902.

Turner, Government Advocate, for appellant.

O'Gorman, for respondent.

The judgment of the Court was delivered by

ANDERSON, J.—This is an appeal by Government from the order of a Magistrate, 1st Class, acquitting one Nek Muhammad, Assistant Station Master, Jhelum, from a charge under Section 168, Indian Penal Code. 17th July 1903.

It is proved and admitted that Nek Muhammad had engaged in money-lending transactions whilst stationed at Jhelum. His father, Alif Khan, had a certain amount of money which he lent out, and, on his death, Nek Muhammad collected his debts and continued to lend money and kept an account of his transactions.

⁽¹⁾ 51 P. R., 1886.

⁽²⁾ 7 L. J. Ex., 110.

} APPELLATE SIDE.

It has not been proved that accused really took part in a wheat speculation, although he lent money to others for the purpose of buying wheat, nor that he set up a shop for purchase and sale of wheat at Lyallpur.

On referring to the definition of the word "trade" in the Century Dictionary and Encyclopædia, published in 1899, by the *Times*, London, and Century Company, New York, and in the Standard Dictionary of the English Language, besides the definitions cited by the Magistrate, who tried the case, from Webster, Ogilvie and Wharton's Law Lexicon, we are of opinion that the word "trade," taken in its ordinary acceptance, does not include lending money at interest.

In a Civil Judgment by a Bench of this Court in the case of *H. H. The Maharaja of Kashmir v. Mohan Lal and another* ⁽¹⁾, Barkley, J., emitted the following *dictum* as to the meaning of trade or trading, employed, though not defined in the Civil Procedure Code, to the effect that such terms must be taken in the ordinary sense, and, in the case then under consideration, taking a mortgage to secure a debt (a further advance being made at the time) was not regarded as an act of trade, nor was the Maharaja held to have traded though concerned in the transaction. The definition of "trade" given in Wharton's Law Lexicon as "traffic commerce, exchange of goods for other goods or for money" was followed and approved of in this judgment. In Stroud's Judicial Dictionary, p. 815, Banking is, however, referred to as having been held a trade or dealing in the case of *Hall v. Franklin* ⁽²⁾, but this was an old case and an extraordinary interpretation of a statute since modified. In the present case we are not prepared to hold that Nek Muhammad's conduct, however objectionable it may have been to his superiors, or however much it may have interfered with the performance of his official duties, can be held to have brought him within the reach of the criminal law.

We accordingly reject the appeal from the Magistrate's order of acquittal.

Appeal dismissed.

⁽¹⁾ 15 P. R., 1886, ⁽²⁾ 7 L. J. Ex., 110; L. R., 3 M. and W., 249.

No. 23.

*Before Sir William Clark, Kt., Chief Judge, and Mr.
Justice Anderson.*

DIN MUHAMMAD,—PETITIONER,

Versus

THE MUNICIPAL COMMITTEE OF AMRITSAR,—
RESPONDENT.

REVISION SIDE.

Criminal Revision No. 1 of 1903.

Punjab Municipal Act, 1891, Section 201—Recovery of Taxes, etc., by a Committee under the Act—Revision—Power of Chief Court to revise an order passed by a Magistrate under Section 201, Punjab Municipal Act—Criminal Procedure Code, 1898, Section 439.

Held, that arrears of a contract of Municipal sewerage do not come within the scope of Section 201 of the Punjab Municipal Act and as such are not recoverable under that Section.

The section contemplates the realization of arrears of any tax, fee, or any other money claimable by a Committee under that Act as such and does not include the arrears which are claimable under a simple contract.

Held, also, that under Section 439 of the Criminal Procedure Code the Chief Court has power to revise an order passed by a Magistrate granting or refusing an application of a Committee under Section 201 of the Punjab Municipal Act.

Ellis v. Municipal Board of Mussoorie ⁽¹⁾, *Lalji v. Municipal Committee, Lahore* ⁽²⁾, *Nando Lal Basak v. Mitter* ⁽³⁾, *Dewan Chand v. Queen-Empress* ⁽⁴⁾, *Ganda Singh v. Bisakhi* ⁽⁵⁾, and *In re Jaju Santram* ⁽⁶⁾, referred to.

Case reported by A. E. Hurry, Esquire, Sessions Judge, Amritsar Division, on 19th December 1902.

Golak Nath and Muhammad Shah, for petitioner.

Lal Chand, for respondent.

The facts of this case were as follows :—

At the instance of the Municipal Committee of Amritsar, the Tahsildar-Magistrate of Amritsar, on the 24th October 1902, ordered realisation by attachment, of arrears of a contract for Municipal Sewerage, arrears Rs. 1,736-0-6, under Section 201, Punjab Municipal Act.

⁽¹⁾ *I. L. R.*, XXII All., 111.

⁽²⁾ *1 P. R.*, 1891, Cr.

⁽³⁾ *I. L. R.*, XXVI Calc., 852.

⁽⁴⁾ *2 P. R.*, 1899, Cr.

⁽⁵⁾ *18 P. R.*, 1902, Cr.

⁽⁶⁾ *I. L. R.*, XXII Bom., 709.

The proceedings were forwarded for revision on the following grounds :—

The Contractor, Din Muhammad, of a Municipal contract for sewage water of the Amritsar Municipality has been ordered, under pressure of an attachment, under Section 201, Punjab Municipal Act, to pay up the arrears said to be due by him. He seeks for cancellation of the attachment as unauthorised. I do not think a Municipal Committee can treat arrears on a simple contract, as these are, as falling within the scope of Section 201 of the Act. The arrears are not claimable under the Act, but under a contract. I think the attachment should be set aside.

The point of law involved was referred to a Bench by the following order of the learned Chief Judge in Chambers :—

19th June 1903.

CLARK, C. J.—At the instance of the Municipal Committee, Amritsar, the Tahsildar-Magistrate of Amritsar, ordered realisation, under Section 201 of the Municipal Act, XX of 1891, by distress and sale of movable property, of arrears of a contract for Municipal Sewerage due from one Din Muhammad, arrears Rs. 1,736.

The Sessions Judge has referred the case to this Court for revision of the Magistrate's order.

The first argument of the pleader on behalf of the Municipal Committee is that no revision lies. That the action of the Magistrate, under Section 201 of the Municipal Act, is ministerial not judicial, and that his procedure is regulated under the Municipal Act and not under the Criminal Procedure Code, and is, therefore, not open to revision by this Court.

In support of the Magistrate's action being ministerial, *Ellis v. The Municipal Board of Mussoorie* (1), is quoted.

The question there was whether the Magistrate could inquire into the question whether the arrears claimed were due or not, and from that point of view it was held that the duty imposed on the Magistrate was purely ministerial and that he could not enquire into the question.

The point whether a revision lay or not was not raised, and the revision was entertained.

The decision in that case is opposed to the decision of this Court in *Lalji v. Municipal Committee, Lahore*, (2), where Sir

(1) *I. L. R.*, XXII All., 111. (2) *1 P. R.*, 1891, Cr.

Charles Roe held: "The position of a Magistrate acting under "Section 172, Act XIII, 1884, is, I consider, similar to that "of a Magistrate recovering, under the Criminal Procedure Code, "a fine passed by another Magistrate," and that he would have to satisfy himself that the Committee was legally constituted, and that the amount claimed was claimed under a tax legally imposed by the Committee.

This would obviously be something more than a ministerial act.

I may notice that in this case also the revision was entertained and no question raised as to a revision not being entertainable.

My view is that Section 201, when it speaks of the "application to a Magistrate having jurisdiction within the limits "of the Municipality" and authorizes recovery by the distress and sale of movable property, refers by implication to Section 386, Criminal Procedure Code, and the Magistrate becomes invested with the powers given under that Chapter of the Code. Otherwise the Magistrate is given no power to issue warrant or proceed with the distress and sale.

It would have been desirable that words to this effect should have been inserted in the section.

They are inserted in the corresponding Section 84 of the Bombay District Municipal Act, VI, 1873, where it is provided for the due being "recovered by a summary proceeding before "such Magistrate in the manner provided in the Code of Criminal Procedure, 1882."

But supposing that the Magistrate, acting under Section 201 of the Municipal Act, is acting under the Criminal Procedure Code, it is further argued that even so this Court has no power of revision under Section 439, Criminal Procedure Code, as it is not empowered by the section quoted in the body of that section to exercise the power, and *Nando Lal Basak v. Mitter* (¹), is quoted. In that case the Judges expressed an opinion that under Section 439, Criminal Procedure Code, they could not revise an order under Section 197, Criminal Procedure Code, but that they had the power under the Charter Act.

(¹) *I. L. R.*, XXVI Cal., 852.

However in *Dewan Chand v Queen-Empress* ⁽¹⁾, and *Ganda Singh v. Bisakhi* ⁽²⁾, revision of orders, under Sections 143, 144, 145, Criminal Procedure Code, and Section 476, Criminal Procedure Code, have been entertained.

That a Tahsildar-Magistrate should be empowered, free from all control, to recover any sums claimable by a Municipal Committee by distress and sale of movable property would be a most unfortunate state of things certainly not contemplated by the Legislature.

The question raised is an important and difficult one, and I am not clear as to the power of this Court to revise the order of the Magistrate. I, therefore, refer the case to a Bench.

The judgment of the Court was delivered by.

21st July 1903.

CLARK, C. J.—This case has been referred to this Bench by this Court's order of 19th June 1903, and the question for decision is, whether, granting that the Magistrate, acting under Section 201 of the Municipal Act, is acting under Section 386 of the Criminal Procedure Code, this Court has power to revise his order, under Section 439, Criminal Procedure Code.

Nando Lal Basak v. Mitter ⁽³⁾ is quoted against the power of revision. That is a somewhat special case, and refers to the powers of revision of an order under Section 197, Criminal Procedure Code, and is governed under Section 439, Criminal Procedure Code, by "the powers conferred on a Court of Appeal by Section 195." Now Section 195 lays down its own provisions as to appeal. This case, on the other hand, is governed by "the powers conferred on a Court of Appeal by Section 423, "Criminal Procedure Code" and Section 423 (c) gives the Appellate Court power in an appeal from any other order than those under 423 (a), (b) to alter or reverse such order.

We think that this gives this Court power to revise an order under Section 386, Criminal Procedure Code. Similar revisions have always been entertained from orders under Sections 250, 145, 110, 107, Criminal Procedure Code, and also from orders under Special Acts.

The order of the Magistrate for the recovery of arrears of a contract of Municipal Sewerage under Section 201, Municipal Act, is not warranted by the words of the section, which refers

⁽¹⁾ 2 P. R., 1899, Cr.

⁽²⁾ 18 P. R., 1902, Cr.

⁽³⁾ I. L. R., XXVI Cal., 852.

to "Any arrears of any tax or fee or any other money claimable
"by a Committee under this Act."

This would not include the arrears of a contract, see also
In re Jagu Santram (1).

We set aside the order of the Magistrate.

Application allowed.

No. 24.

*Before Sir William Clark, Kt., Chief Judge,
and Mr. Justice Anderson.*

MANNA,—PETITIONER,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Revision No. 118 of 1903.

*Security for good behaviour—Discharge of person called upon—Power
of District Magistrate to order further enquiry—Accused person—Criminal
Procedure Code, 1898, Sections 110, 119 and 437.*

Held, that a District Magistrate is competent to revise the proceed-
ings of a Magistrate subordinate to him who, under Section 119 of the
Criminal Procedure Code, has discharged a person called upon under
Section 110 to furnish security for good behaviour, but such powers
should be exercised sparingly and with great caution and only in those
cases where further evidence is forthcoming on the part of the prosecution,
and it is undesirable to use such powers with a view that another Magis-
trate should hear and decide the matter on the same evidence.

A person against whom proceedings are taken under Section 110 of the
Code of Criminal Procedure is "an accused person" within the meaning
of Section 437 of the Code.

Queen-Empress v. Mutasaddi Lal (2), and *Queen-Empress v. Mona
Puna* (3) cited.

Queen-Empress v. Iman Mondal (4) dissented from.

*Petition for revision of the order of H. P. Tollinton, Esquire,
District Magistrate, Sialkot, dated 21st November 1902.*

The judgment of the Court was delivered by

ANDERSON, J.—The question referred for consideration of 1st Aug. 1903.
the Bench is whether a Magistrate of a District can revise the
proceedings of a Magistrate subordinate to him, who has, under
Section 119 of the Criminal Procedure Code, discharged a person
called upon under Section 110 of the Code to show cause why he
should not furnish security for his future good behaviour.

(1) *I. L. R.*, XXII Bom., 709.

(2) *I. L. R.*, XVI Bom., 661.

(3) *I. L. R.*, XXI All., 107.

(4) *I. L. R.*, XXVII Calc., 662.

Section 437 of the Criminal Procedure Code provides that the District Magistrate may direct any subordinate Magistrate to make further enquiry into the case of any accused person who has been discharged.

In the case of *Queen-Empress v. Mutasaddi Lal* ⁽¹⁾ it was held that a person against whom proceedings under Chapter VIII of the Code of Criminal Procedure are being taken, is an "accused person," and the interpretation of the phrase "accused person" as laid down by the Bombay High Court in *Queen-Empress v. Mona Puna* ⁽²⁾ was followed. It was there held that the term "accused" means a person over whom a Magistrate or Court is exercising jurisdiction. In the Allababad case, Banerji, J., refused to interfere with an order of a District Magistrate ordering further enquiry.

A contrary view was taken by a Bench of the Calcutta High Court in the case of *Queen-Empress v. Iman Mondal* ⁽³⁾, where it was held by Prinsep and Stanley, JJ., that further enquiry cannot be made into the case of a person discharged in such proceedings, but that the Magistrate can institute further proceedings only on fresh information received.

After considering the matter and having enquired into the previous practice of this Court when the question has come up, we think that the Calcutta ruling though somewhat later in date should not, with all due deference to the opinion of the learned Judges who composed the Bench, be followed.

A person against whom proceedings are taken under Section 110, Criminal Procedure Code, may be considered to be in the position of an accused from the time that he appears before the Court till the conclusion of the proceedings, and, if not called upon to furnish security, he may be regarded as discharged. If his evidence has been called for and taken as sufficient to justify the Magistrate in declining to take security, he must still be regarded as "discharged," and not as "acquitted." To forbid the District Magistrate to order further enquiry into the case until further information is forthcoming does not appear to us to be any more necessary in the case of a person so accused than in the case of a person against whom a complaint has been made. It would not be desirable that District Magistrate should exercise the power of revision arbitrarily or harshly in such cases, but under the safeguards provided by Section 437, if further evidence

(1) I. L. R., XXI All., 107. (2) I. L. R., XVI Bom., 661.

(3) I. L. R., XXVII Calc., 662.

is forthcoming, it may just as well be taken and considered in the same proceedings instead of waiting until further information is laid, which might be in the course of the next week or month. This would constitute the "further inquiry" contemplated by that section, and a necessary ingredient would be that fresh evidence should be forthcoming on the part of the prosecution. That another Magistrate should hear and decide the matter on the same evidence would not, apparently, be what is contemplated.

In the present case the District Magistrate's order does not show quite clearly that he had himself understood this and made it clear to the Magistrate to whom he made over the case for disposal. We think this should be done, but otherwise we are not prepared to accede to the grounds advanced by the petitioner for setting aside that order in revision.

The application is accordingly rejected.

Application dismissed.

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No. 25.

Before Mr. Justice Reid.

CROWN, THROUGH STATION MASTER, THANESAR,—
COMPLAINANT,

Versus

PARAS RAM,—PETITIONER.

Criminal Revision No. 318 of 1903.

Railway Company—Passenger's luggage—Person sending his luggage by a friend—Cheating—Penal Code, Section 415—Attempt to defraud—Railway Act—Bye-law imposing penalty for endeavouring to evade payment of full fare.

The petitioner was charged before a first class Magistrate with an offence under Section 417 of the Penal Code, in that he had made over some of his luggage to a friend for conveyance by rail. That charge was dismissed but the Magistrate convicted him of attempting to defraud the Railway Company by evading a bye-law imposing a penalty in that he had endeavoured to evade payment of charge for overweight, holding that the accused intended to travel by train and had made over his luggage to his friend in order to evade such charge.

Held, that the conviction was bad. Every passenger being entitled to the conveyance of a certain quantity of luggage and, in the absence of a rule providing for the conveyance of the passenger's own personal property only, the servants of a Railway Company not being competent to enquire into the ownership of luggage which passengers take with them when travelling,

} REVISION SIDE.

Case reported by T. J. Kennedy, Esquire, Sessions Judge, Umballa Division, on 16th March 1903.

The facts of this case were as follows:—

The applicant for revision, Paras Ram, entrusted some of his luggage (clothing and other personal effects) at Ajodhya to a friend, Kirpa Ram, who was going to Umballa, as he (Paras Ram) was not returning home direct. At Thanesar it was found that all the property booked by Kirpa Ram did not belong to him, but a part of it belonged to Paras Ram. Paras Ram, who does not deny the facts, was prosecuted under Section 417, Indian Penal Code, was acquitted on this charge, but convicted of attempting to defraud the Railway Company.

The accused, on conviction by Sheikh Rukn-ud-din, exercising the powers of a Magistrate of the first class in the Karnal District, was sentenced, by order, dated 16th February 1903, under Section 8 of the Bye-laws under the Railway Act, to a fine of Rs. 5.

The proceedings were forwarded for revision on the following grounds:—

(1) There was no attempt to defraud the Railway Company by endeavouring to evade payment of his full fare by the applicant. He did not travel himself, nor pay any fare on the occasion on which the luggage was carried.

(2) There is no provision of the law, nor any Railway rule prescribing that passengers must only carry with them their own property. Rule 91 of Luggage Rates and Rules of East India Railway contemplates Commercial Travellers carrying with them samples of their employees goods. Excess luggage was paid for by Kirpa Ram, and he has not been convicted of any offence, so the presumption is that whatever luggage was carried was paid for.

(3) I recommend that the fine imposed on the applicant, who apparently is a respectable *Banyia* and says he pays Rs. 28 income-tax, be remitted.

Note.—Bye-law 8, under which the applicant has been convicted, runs as follows:—

“Every person attempting to defraud the Railway Company by, in any manner, endeavouring to evade payment of his full fare, is liable to a fine of Rs. 100.”

The judgment of the Chief Court was delivered by

15th July 1903.

REID, J.—The petitioner has been fined Rs. 5 under Bye-law 8 of the East India Railway Company, for sending his luggage by Kirpa Ram, a passenger in a train in which he was not himself travelling. The learned Sessions Judge of Umballa has sent the case up on the revision side, and has found that Kirpa Ram paid for over-weight luggage. Rule 76 at page 41 of the East India Railway Coaching Tariff for the 1st quarter of 1902

runs as follows :—“ *Luggage* includes wearing apparel and effects “required for the personal use of passengers. Persons tendering “amongst their luggage articles not properly classible as luggage “do so at their own risk; (a) all passengers’ luggage is weighed “and the following quantities allowed to be taken free of charge “both on the outward and return journey.

For each first class passenger $1\frac{1}{2}$ maunds.

“ second class „ 30 seers.

“ intermediate „ 20 „

“ third „ 15 „

“ Half the above quantities are allowed for a child’s half “ticket according to class.”

Bye-law 8 runs as follows :—“ Every person attempting to “defraud the Railway Company by, in any manner, endeavour- “ing to evade payment of his full fare is liable to a fine of “Rs. 100.”

The gentleman, who represented the East India Railway Company at the hearing, contended that, inasmuch as tickets are not transferable, each passenger can carry with him his own property only, and that the allowance of luggage for a ticket is limited to the personal property of the person who has paid for a ticket. He admitted that a person who took a ticket for himself and three tickets for his servants could have the luggage of the four weighed together, and that the aggregate allowed on the four tickets would be carried free, provided that the articles weighed belonged to the taker of the ticket and his servants, irrespective of the weight of the articles belonging to each.

I can find nothing in Rule 76 in any way limiting a person taking a ticket to the conveyance of his own personal property. The first part of the rule merely defines the word “luggage,” and the distinction drawn is between articles “properly classible” and articles “not properly classible” as “luggage.”

“Personal use of passengers” cannot, in my opinion, be interpreted as “personal use of the passenger taking the ticket and of no one else.” No other rule has been cited.

The case for the Railway Company presupposes that the petitioner had travelled or intended to travel by train and that he evaded payment for over-weight luggage by sending part of his luggage by Kirpa Ram. Bye-law 8 deals only with endeavours to evade payment of “full fare,” and these words are, in my opinion, limited to full payment for the conveyance of the

passenger from a specified place to a specified place, and in the class of carriage in which he travels.

Wharton's Law Lexicon defines "fare" as "the money paid for a passage either by land or by water."

In Stroud's Judicial Dictionary "His fare" in 8 Vict., Cap. 20, Section 103, is defined as "the fare by the train, and for the class of carriage in which the passenger travels."

Webster's Dictionary defines "fare" as "the price of a passage or going; the sum paid or due for conveying a person by land or water."

The fact that a passenger is entitled to the conveyance of a certain quantity of luggage without payment does not, in my opinion, make the amount, paid for luggage in excess of that quantity, part of his fare. The payment is apart from the fare, and the fact that no luggage is conveyed for a passenger does not entitle him to a reduction of the fare paid for conveyance of his person.

Bye-law 8 is, therefore, inapplicable to the facts of this case.

The duty of the servants of the Railway Company does not, in my opinion, extend to an enquiry into the ownership of the articles which a passenger seeks to have conveyed with him.

I set aside the conviction and sentence.

The fine, if realised, will be refunded.

Application allowed.

No. 26.

Before Mr. Justice Robertson.

CROWN,

Versus

MIRAN,—ACCUSED.

} REVISION SIDE.

Criminal Revision No. 899 of 1903.

Criminal Procedure Code, 1898, Section 488—Maintenance—Order for maintenance against the husband's father, legality of.

Held, that an order for maintenance against the husband's father is not warranted by law. Section 488, Criminal Procedure Code, does not empower a Magistrate to pass an order of maintenance against any one but the woman's husband.

Case reported by W. Chevis, Esquire, Sessions Judge, Rawalpindi Division, on 11th August 1903.

The facts of this case were as follows:—

On 16th June 1903 the complainant, Mussammat Sahib Nishan, filed an application against her husband Miran, minor, through his father, Shahwali, for maintenance, under Section 488 of the Criminal Procedure Code. The Magistrate awarded maintenance against Shahwali in person.

The accused, on conviction by J. E. Stephens, Esquire, exercising the powers of a Magistrate of the 1st class in the Rawalpindi District, was ordered, by order, dated 31st July 1903, under Section 488 of the Criminal Procedure Code, to pay Rs. 4 per mensem to Mussammat Sahib Nishan as maintenance.

The proceedings were forwarded for revision on the following grounds:—

Complainant, a woman of 20, has brought a claim for maintenance against her husband, a boy of 9. The Magistrate has passed an order saying that it is but right that the boy's father should help to maintain her till the boy attains puberty and is able to take care of his wife, and so the boy's father is to pay Rs. 4 per mensem as maintenance out of his income of Rupees 80 a year. This means that the man, who has his own wife and family to maintain, is to give more than half his income to the young woman, who has married his little boy. But under Section 488, Criminal Procedure Code, a man is only liable for his own wife and children, and I fail to see how Shahwali can be made liable under this section for the maintenance of his daughter-in-law. The boy is living under the guardianship of his father, a Musalman zamindar, and it is not claimed that he has any means of his own.

I send the case to the Chief Court, with a recommendation that the order of the Magistrate be set aside.

The judgment of the Chief Court was delivered by—

24th Oct. 1903.

ROBERTSON, J.—Section 488, Criminal Procedure Code, does not empower a Magistrate to make an order of maintenance against any one but the woman's husband. The order against the husband's father is not justified by law, and must be set aside, and is set aside accordingly.

No. 27.

Before Sir William Clark, Kt., Chief Judge.

NUR DIN ALIAS KADA,—PETITIONER,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Revision No. 636 of 1903.

REVISION SIDE.

Criminal Procedure Code, 1898, Section 110—Security for good behaviour from habitual offenders—Evidence—Personal knowledge of Magistrate—Procedure—Remarks respecting witnesses—Witnesses not to be restrained from stating their real opinions.

Held, that in a trial under Section 110, Criminal Procedure Code, Magistrates are not competent to base their orders on their local and personal knowledge of the accused and witnesses.

It is a fundamental principle in the administration of justice that the accused should know what the evidence against him is, and that he should have an opportunity of testing it by cross-examination, and this principle is violated where the Magistrate's order is based upon knowledge locked up within his own breast and not placed on the record.

The proper procedure where it is important to utilise the personal knowledge of a Magistrate is for the case to be tried by another Magistrate and for the Magistrate with the personal knowledge to give evidence as a witness.

The right of Magistrates to make disparaging remarks on persons who appear or are named in the course of a trial is one that should be exercised with great reserve and moderation, especially where the person disparaged has had little or no opportunity of explaining or defending himself. It would involve a great danger to the administration of justice if witnesses were restrained from stating their real opinions for fear of displeasing the Magistrate before whom they are giving evidence and [great caution should be taken to avoid producing such an unfortunate result.

Abin-ud-din Howladar v. Emperor ⁽¹⁾, *Empress v. Donnelly* ⁽²⁾, and *Sukha v. Queen-Empress* ⁽³⁾, cited.

⁽¹⁾ *I. L. R.*, XXIX Cal., 392. ⁽²⁾ *I. L. R.*, II All., 405.
⁽³⁾ 4 P. R. 1898, Cr.

*Petition for revision of the order of C. H. Atkins, Esquire,
District Magistrate, Lahore, dated 14th April 1903.*

Shah Din, for petitioner.

Petman, Assistant Legal Remembrancer, for respondent.

The judgment of the learned Chief Judge was as follows:—

CLARK, C. J.—Nur Din has been ordered by the City Magistrate of Lahore to furnish security in Rs. 600 for his good behaviour under Section 110, Criminal Procedure Code, and his appeal to the District Magistrate has been dismissed. 24th Nov. 1903.

The Magistrate does not specify under which clause of Section 110, Criminal Procedure Code, he holds Nur Din to come, but the District Magistrate has held him to come under Section 110 (f) as being so desperate and dangerous as to render his being at large without security hazardous to the community.

The evidence for the prosecution consisted of five Police witnesses and three other witnesses—(1) Maulvi Fazal Din, Pleader of the Chief Court and Vice-President of the Municipal Committee, in whose ward Nur Din lives; (2) Abdul Karim, a Municipal Commissioner; (3) Khuda Bakhsh, Zaildar.

The evidence of Fazal Din is in some respects damaging to Nur Din, but he considers him now reformed and not to be a desperate and dangerous character.

The evidence of the other two witnesses is distinctly in favour of Nur Din.

Nur Din produced twelve witnesses in his defence, men of wealth and position, who give him a good character.

On the evidence on the record, therefore, no case is made out against Nur Din on any of the clauses of Section 110, Criminal Procedure Code, and this is admitted by the District Magistrate, who relies upon the local knowledge of the City Magistrate and himself to make up for the deficiency of evidence, and to estimate the value of the evidence given.

The District Magistrate says:—

“ It is impossible that a City or District Magistrate who has
“ been for some years in a City or District should not know
“ fairly well who are really the noted bad characters within his
“ jurisdiction. The City Magistrate has shown by his judgment
“ that he know the character of Nur Din and knew the amount
“ of reliance to be placed on the evidence of the various witnesses.
“ He also knew why the City Inspector, who sent up the case only

“ because ordered to do so by the Assistant Superintendent of
“ Police in charge of the city, was not himself prepared to give
“ evidence against Nur Din. Were this not explained it is
“ evident that in such a case Nur Din must have been at once
“ discharged when, firstly, the City Inspector, who has been in
“ charge of the city for years, refused to give evidence and
“ secondly men of the standing of M. Abdul Karim and Chaudhri
“ Faiz Bakhsh, Municipal Commissioners, Chiragh Din, a large
“ Contractor, and Khuda Bakhsh, Zaildar, gave evidence in Nur
“ Din’s favour.

“ The Magistrate has explained from his personal knowledge
“ why he has nevertheless believed it to be true that Nur Din
“ is a fit person to be placed on security. In doing so he has
“ necessarily cast very grave aspersions on the character of the
“ City Inspector, Muhammad Hussain, who is stated to be his
“ friend and protector.”

This raises the question whether, in a trial under Section 110, Criminal Procedure Code, Magistrates may base their orders on their local and personal knowledge of the accused and witnesses.

The District Magistrate is of opinion that they may, in this opinion I am unable to agree.

The proceedings under Section 110, Criminal Procedure Code, are judicial and not executive proceedings.

It is a fundamental principle in the administration of justice that the accused should know what is the evidence against him, and should have an opportunity of testing it by cross-examination. This principle is violated where the Magistrate’s order is based upon knowledge locked within his own breast and not put upon the record.

Strong authority would be necessary to support any violation of this principle, none has been quoted to me by the learned counsel appearing for Government, on the other hand there is a considerable amount of authority to support the enforcement of this principle.

It is distinctly laid down in *Abin-ud-din Howladar v. Emperor* ⁽¹⁾, a case under Section 110, Criminal Procedure Code that where a Magistrate proceeded on his own knowledge of the character of the accused, he should not try the case. That a

(1) *I. L. R.*, XXIX Cal., 392.

Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact is laid down in *Empress v. Donnelly* ⁽¹⁾.

A similar view was taken in *Sukha v. Queen-Empress* ⁽²⁾, also a case under Section 110, Criminal Procedure Code, where the Judges held that: "The case is one which must be decided "on evidence taken in Court just like all other criminal "cases, and the District Magistrate was not entitled to rely on "his own personal knowledge."

The personal knowledge of the Magistrate who tried this case and the appeal being left out of consideration there is no case against the accused, and I set aside the order requiring accused to furnish security.

If it is important to utilise the personal knowledge of a Magistrate, the proper procedure is for the case to be tried by another Magistrate, and for the Magistrate with personal knowledge to give evidence as a witness.

As regards the aspersions cast upon Maulvi Fazal Din and the City Inspector, Muhammad Hussain, by the City Magistrate, I think it incumbent on me to make some remarks. The right of Magistrates to make disparaging remarks on persons who appear, or are named, in the course of a trial, is one that should be exercised with great reserve and moderation, especially where the person disparaged has had little or no opportunity of explaining or defending himself; the City Inspector was not even a witness in the case and had no opportunity at all of explaining his conduct.

With reference to Maulvi Fazal Din, *he was the first witness* examined in the case, after he had given a little evidence, to which no apparent objection could be taken, except that it was not against the accused, the Magistrate took upon himself to give the witness the *kalama* oath. There was no legal authority for the Magistrate to do this, the witness not volunteering to take the oath, and no such procedure is authorised by the Oaths Act, X of 1873. It was a grave discourtesy to the witness, a man of high character and position, being tantamount to saying that the witness would not tell the truth on the ordinary oath. It also shows that the Magistrate did not approach the case with a judicial spirit, but started with an opinion unfavourable to the accused.

(¹) *I. L. R.*, II All., 405. (²) 4 *P. R.*, 1898, Cr.

The justness of the censure on Maulvi Fazal Din rests at best on the correctness of the view of the Magistrate that Nur Din was a dangerous and desperate character. If Nur Din was, as the witness said, reformed to a great extent, there was no ground for the censure. My conclusion being that it is not proved that Nur Din is now a desperate and dangerous character, there remains no basis for thinking that Maulvi Fazal Din was not giving true and honest evidence as to what he thought on the subject.

It would involve a grave danger to the administration of justice if witnesses were restrained from stating their real opinions for fear of displeasing the Magistrate before whom they are giving evidence, and great caution should be taken to avoid producing any such unfortunate result.

The same remark applies to the City Inspector, the justness of the censure disappears when the guilt of the accused is not made out, for it rested upon the City Inspector's not having himself taken action against Nur Din.

I therefore think it right to record my opinion that the strictures passed on Maulvi Fazal Din and Muhammad Hussain were unwarranted, and should in no way be taken into account against them.

Application allowed.

No. 28.

*Before Sir William Clark, Kt., Chief Judge, and Mr.
Justice Reid.*

CROWN,

Versus

NUR DIN.

Criminal Revision No. 1132 of 1903.

*Sentence—Sentence after previous convictions for similar offences—
Penal Code, Section 75.*

The accused, who had already been six times convicted of similar offences, was charged under Section 379, Indian Penal Code, with the theft of a pair of shoes. The Magistrate found him guilty and convicted him to a year's rigorous imprisonment and thirty stripes.

Held, that the Magistrate should have committed the prisoner to the Court of Sessions, as the case was one in which the advisability of transporting him for life should have been carefully considered. In such cases too much importance should not be attached to the value of the property stolen in awarding sentences, the important question to consider is the intention of the man and his character and attitude towards society.

REVISION SIDE. }

Case called for by Chief Court under Section 435 and disposed of under Section 439, Criminal Procedure Code.

The judgment of the Court was delivered by

CLARK, C. J.—After six previous convictions running from 23rd Nov. 1903, 1887 down to 1901 for offences against property, in two cases the sentences being each for period of three years' imprisonment, the Magistrate has thought a sentence of one year's rigorous imprisonment and thirty stripes sufficient, and has not even taken action against accused under Section 565, Criminal Procedure Code. It is true that the property stolen was only a pair of shoes, but the man's previous record shows that he is an incorrigible offender, a man intending to live by preying on society. Too much importance is very generally attached to the value of the property stolen in awarding sentences. The value of the property stolen is very often a mere accident, and the important question is the intention of the man, and his character and attitude towards society.

This accused should have been committed to the Court of Sessions, as the case is one in which the advisability of transporting him for life should have been carefully considered.

As, however, the accused has been whipped, he cannot now be sentenced to more than five years' rigorous imprisonment.

Passing no opinion as to the guilt of accused, we set aside the conviction and sentence of imprisonment, and direct the accused to be tried by a Magistrate with powers under Section 30, Criminal Procedure Code.

No. 29.

Before Sir William Clark, Kt., Chief Judge.

CROWN, THROUGH TOPAN RAM,—COMPLAINANT,

Versus

HIRA NAND AND ANOTHER,—ACCUSED.

} REVISION SIDE.

Criminal Revision No. 629 of 1903.

Compensation in Criminal cases—Award of, to accused—Order of payment of compensation set aside—Refund of, from accused—Procedure—Criminal Procedure Code, 1898. Sections 250, 547.

Held, that when the order of payment of compensation has been set aside by an Appellate Court or a Court of Revision, the Criminal Courts are competent under the provisions of Section 547 of the Code of Criminal Procedure to enforce the refund of the compensation paid to an accused person as if it were a fine.

Howanna Ram v. Jassu Ram ⁽¹⁾, and *Mutasaddi v. Mani Ram* ⁽²⁾, cited.

Chogatta v. The Empress ⁽³⁾, not followed.

Case reported by Khan Abdai Ghafur Khan, Sessions Judge,
Shahpur Division, on 13th June 1903.

Brandon, for accused.

The facts of this case were as follows :—

On the rejection of Topan Ram's complaint, under Section 436, Indian Penal Code, against Hira Nand and Wajha Nand, by the District Magistrate, Mianwali, he awarded Rs. 50 as compensation to each of the accused from the complainant under Section 250, Criminal Procedure Code. On an application for revision to the Sessions Judge, a reference was made by him to the Chief Court under Section 438, Criminal Procedure Code, for setting aside the Magistrate's order in accordance with *Crown v. Hamir Chand* ⁽⁴⁾. The Chief Court set aside that order. Meanwhile the compensation had been paid to the accused. The complainant applied for recovery of the amount from accused, in accordance with the Chief Court's order. The District Magistrate, Mianwali, following *Chogatta v. The Empress* ⁽³⁾, refused the application by his order, dated 25th March 1903, and directed the applicant to obtain his remedy by a Civil Court.

The complainant applied to the Sessions Judge for revision of that order, who forwarded the proceedings to the Chief Court for revision on the following grounds :—

Section 547, Criminal Procedure Code, provides that any money (other than fine) payable by virtue of any order made under the Criminal Procedure Code shall be recoverable as if it were fine.

This section has been interpreted by the Chief Court in *Howanna Ram v. Jassu Ram* ⁽¹⁾, to cover cases of the nature now before me. The same view has been taken by the Allahabad High Court in *Mutassadi v. Mani Ram* ⁽²⁾. In my opinion the provisions of Section 547, Criminal Procedure Code, confer authority on criminal Courts to realize compensation paid to accused under Section 260, Criminal Procedure Code, as if it were fine, when the order of payment of compensation is set aside by an Appellate Court or a Court of Revision.

In *Chogatta v. The Empress* ⁽³⁾, the Hon'ble Judges did not take the provisions of Section 547, Criminal Procedure Code, into consideration, and the order against which a reference was made was passed under Section 545, Criminal Procedure Code. The Judges deciding that case only took into consideration the provisions of Section 545, Criminal Procedure Code.

The District Magistrate's order, dated 25th March 1903, appears to me to be illegal. I, therefore, submit these proceedings to the Chief

⁽¹⁾ 12 P. R., 1885, Cr.

⁽²⁾ I. L. R., XIX All., 112.

⁽³⁾ 2 P. R., 1889, Cr.

⁽⁴⁾ 14 P. R., 1902, Cr.

Court under Section 438, Criminal Procedure Code, with a recommendation that that order be set aside and the District Magistrate be ordered to realize the amount of compensation paid to the two accused on the complainant's application, in accordance with the provisions of Section 547, Criminal Procedure Code.

The judgment of the Chief Court was delivered by

CLARK, C. J.—Agreeing with the reference of the Sessions Judge, 6th October 1903. Judge, I direct that the compensation, if paid, be recovered under Section 547, Criminal Procedure Code.

No. 30.

Before Mr. Justice Reid.

GURMUKH SINGH,—PETITIONER,

Versus

NAMAN,—RESPONDENT.

} REVISION SIDE.

Criminal Revision No. 910 of 1903.

Sanction to prosecute—Dismissal of a complaint by a third person—Initiation by Court—Revocation of sanction granted by a District Magistrate of its own motion by Sessions Judge—Power of Chief Court to revise the order of the Sessions Judge on an application by a third person—Criminal Procedure Code, 1898, Sections 195, 439.

The petitioner applied to the District Magistrate for sanction under Section 195 of the Code of Criminal Procedure for the prosecution of the respondent for giving false evidence. The District Magistrate rejected this application, but of its own motion directed the prosecution of the respondent for giving false evidence with the intention of evading payment of income-tax. This order was set aside by the Court of Session. The petitioner who had taken no action against the order of the District Magistrate refusing him sanction applied for revision of the order of the Sessions Judge.

Held, that the petitioner's remedy was by revision of the order rejecting his application for sanction. The Chief Court as a Court of revision will not act under Section 439 of the Code on the initiative of a private individual where by doing so it would allow that individual to usurp the functions of the Magistrate of the district who could, if so advised, apply for revision.

Saifulla Khan v. The Emperor of India ⁽¹⁾ and *Lakhi v. The Emperor of India* ⁽²⁾ referred to.

Petition for revision of the order of Khan Abdul Ghafur Khan, Sessions Judge, Shahpur Division, dated 19th May 1903.

Golak Nath, for petitioner.

Ram Chandra, for respondent.

⁽¹⁾ 8 P. R., 1902, Cr. ⁽²⁾ 27 P. R., 1902, Cr.

The judgment of the learned Judge was as follows :—

18th Nov. 1903.

REID, J.—The petitioner applied to the District Magistrate for sanction, under Section 195 of the Code of Criminal Procedure, for the prosecution of the respondent for giving false evidence. The District Magistrate rejected this application, but “ of its own motion ” directed the prosecution of the respondent for giving false evidence with the intention of evading payment of income-tax. This order was signed by the District Magistrate as District Magistrate, and was set aside by the Court of Session on two grounds, that the Magistrate of the 1st class, in whose Court one of two conflicting statements had been made, was not subordinate to the Magistrate of the district, and that the conviction of the respondent “ would not necessarily be secured ” if sanction were accorded.

The petitioner, whose remedy was against the order of the District Magistrate refusing him sanction, now applies for revision on the ground that the District Magistrate accorded sanction as Collector of the District, and that his order could not be interfered with by the Court of Session. As pointed out in *Saifulla Khan v. The Emperor of India* ⁽¹⁾, officials not infrequently misdescribe themselves when passing orders, but any order passed by a District Magistrate as such can be set aside, on cause shown, by a Court of Session, and the order was passed by an official purporting to act as a District Magistrate.

Neither *Saifulla Khan v. The Emperor of India* ⁽¹⁾ nor *Lakhi v. The Emperor of India* ⁽²⁾ helps the petitioner and, apart from the merits, I see no reason for allowing the petitioner to usurp the functions of the Magistrate of the District, who could, if so advised, have applied for revision.

The petitioner's application for sanction having been rejected by the District Magistrate, his remedy was, as already stated, by revision of that order, and I see no reason for exercising on his initiative the discretion rested in this Court under Section 439 of the Code. His action is obviously inspired by malice. The application is dismissed.

Application dismissed.

⁽¹⁾ 8 P. R., 1902, Cr. ⁽²⁾ 27 P. R., 1902, Cr.

No. 31.

*Before Sir William Clark, Kt., Chief Judge,
and Mr. Justice Reid.*

ARURA,—APPELLANT,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Appeal No. 77 of 1903.

} APPELLATE SIDE.

Sentence—Sentence of transportation in lieu of imprisonment—Penal Code, Sections 59, 395.

Held, that the term of transportation under Section 59 of the Penal Code, the only authority for passing sentences of transportation for a period short of life, may not exceed the term of imprisonment provided by law for the offence committed.

Appeal from the order of Kazi Muhammad Aslam, Sessions Judge, Ferozepore Division, dated 28th January 1903.

The judgment of the Court was delivered by

REID, J.—The appellant has been sentenced to transportation for fourteen years for taking part in a dacoity on the 8th March 1900.

16th Nov. 1903.

Several persons were convicted of, and sentenced for, taking part in this dacoity, but the appellant, who absconded, was not arrested until after that trial. The evidence of the approver has, in our opinion, been sufficiently corroborated by the evidence of two trackers, one of whom recognized tracks shown to him immediately after the dacoity as those of the appellant, whose tracks he had examined a short time before in a theft case. The appellant was on this clue searched for but could not be found and we are satisfied that he took part in the dacoity and absconded.

The conviction must therefore be maintained, but the sentence of transportation for fourteen years is illegal.

As pointed out by Messrs. W. Morgan and A. G. Macpherson (afterwards Morgan, C. J., and Macpherson, J.) in their notes on the Penal Code in 1863, and frequently laid down, the Penal Code in no instance specifically provides transportation for any term short of life as a punishment, and Section 59 is the only authority for passing sentences of transportation for a shorter period. The term of transportation under that section cannot exceed the term of imprisonment provided by the section under which a conviction is had, and the maximum term under Section 395 of the Code is ten years.

We reduce the term of the sentence of transportation to ten years With the exception of this reduction of the sentence passed, the appeal is dismissed.

No. 32.

Before Mr. Justice Reid.

REVISION SIDE, {

WADHAWA SINGH AND OTHERS,—PETITIONERS,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Revision No. 1066 of 1903.

Criminal Procedure Code, 1898, Sections 107, 110, 514—Security for good behaviour—Execution of bond under Section 107 by mistake—Forfeiture of such bond on a conviction of the principal for an offence under Section 430, Indian Penal Code.

Notice having issued calling upon A to show cause why he should not execute a bond with sureties for his good behaviour, an order purporting to be made under the authority of Section 110, Criminal Procedure Code, was passed in February 1902, and was upheld on 2nd April 1902 on appeal by the District Magistrate. By mistake a form for a bond under Section 107 was substituted for the form under Section 110, and was duly executed by A and his sureties. On the 27th February 1903 A was convicted of having, on the 15th November 1902, cut the bank of a canal distributary which watered a village below his village and was sentenced under Section 430 of the Penal Code, to rigorous imprisonment for six months. On the 2nd March 1903 the police reported that A's security should be forfeited, whereupon an order against A and his sureties was eventually passed forfeiting the amount mentioned in the bond.

Held, that the bond having been executed under a mistake and without any authority or order for a bond under Section 107 to be taken from A or his sureties, the order forfeiting the security was bad in law and must be set aside.

Held also, following *Queen-Empress v. Man Mohan Lal* ⁽¹⁾ that when a forfeiture of a recognizance bond has been proved before a Magistrate, it is not incumbent on the prosecution to prove at the hearing after notice that the principal had been properly convicted.

Queen-Empress v. Man Mohan Lal ⁽¹⁾ followed.

Queen-Empress v. Harchandra Chowdhury ⁽²⁾ dissented from.

In re Ram Chandr Lalla ⁽³⁾ and in the matter of *Parbutti Churn Bose* ⁽⁴⁾ distinguished.

Petition for revision of the order of Captain J. Frizelle, District Magistrate, Lahore, dated 22nd August 1903.

Dhanpat Rai, for petitioners.

⁽¹⁾ *I. L. R.*, XXI *All.*, 86.

⁽²⁾ 1 *Calc.*, *L. R.*, 134.

⁽³⁾ *I. L. R.*, XXV *Calc.*, 440.

⁽⁴⁾ 3 *Calc.*, *L. R.*, 406.

The judgment of the learned Judge was as follows :—

REID, J.—This is an application for revision of an order forfeiting the amount secured by a bond executed by the petitioner, Wadhawa Singh, under Section 107 of the Code of Criminal Procedure. The terms of the bond were that Wadhawa Singh would not commit a breach of the peace, or do any act likely to cause a breach of the peace. The period specified in the bond was one year from the 25th of February 1902, and the amount of the penalty was Rs. 1,000. The petitioner, Natha, was one of the sureties under the bond.

7th Nov. 1903.

On the 27th February 1903 Wadhawa Singh was convicted of having, on the 15th November 1903, cut the bank of a canal distributary, which watered a village below his village, and was sentenced, under Section 430 of the Penal Code, to rigorous imprisonment for six months. His appeal against the conviction and sentence was dismissed on the 19th March 1903, having been filed on the 11th. On the 2nd March 1903 the police reported that Wadhawa Singh's security should be forfeited. Notice was issued by a Magistrate on the 24th April 1903, and the 8th May was fixed for showing cause.

An order against Wadhawa Singh and the sureties was passed eventually, forfeiting the amount of Rs. 500, the sureties being held liable in the event of the amount not being recovered from Wadhawa Singh.

The proceedings, which terminated in the bond under Section 107 being executed, were instituted under Section 110, and the order passed purported to be under the latter section. An appeal from that order, dismissed by the District Magistrate on the 2nd April 1902, was headed "appeal from the order of charge under Section 110, Criminal Procedure Code," and I see no reason to doubt that a form for a bond under Section 107 was by mistake substituted for the form for a bond under Section 110.

The pleader for the petitioners has contended (i) that the bond is void, the proceedings having been under Section 110 and Wadhawa Singh not having been called on to show cause under Section 107; (ii) that no breach of the peace or act likely to cause a breach of the peace has been established; (iii) that, inasmuch as the Magistrate, who convicted under Section 430 of the Penal Code, did not order forfeiture as part of the proceedings in that case, the subsequent proceedings were bad; (iv) that as

against the sureties the judgment was not conclusive, and that evidence should have been adduced in the forfeiture proceedings that the security had been forfeited. On the second point taken I see no reason to doubt that, in cutting the bank of the canal distributary, Wadhawa Singh did an act likely to cause a breach of the peace. The Magistrate who convicted him found that when the patwari, with about 50 men, went to repair the breach, he found Wadhawa Singh armed with a *chhavi* and with about 10 men prepared to resist, but that he and his party retired on seeing the force at the patwari's disposal. The cultivators of the village, which was deprived by Wadhawa Singh of its share of water, were extremely likely to take the law into their own hands and to break the peace in the event of resistance by Wadhawa Singh and his party, and I hold that that Wadhawa Singh's wrongful act was likely to cause a breach of the peace.

On the third point taken, *in re Ram Chundr Lalla* ⁽¹⁾ (Ainslie, J.) and *in the matter of Partutti Churn Bose* ⁽²⁾ (Ainslie and Maclean, JJ.) were cited for the petitioners. The facts of those cases differ so materially from that before me that it is unnecessary to consider the question of the correctness of the exposition of the law contained in the judgments. In each a considerable period had elapsed before proceedings were instituted. In the present case the police moved before the institution of an appeal from the conviction and sentence. In the Magistrate's Court, in the Section 430 case, it was pleaded that it was impossible that a man bound over under Section 110 in the large sum of Rs. 1,000 could have committed the offence charged, and I see no reason to doubt that the Magistrate anticipated the forfeiture of the security as a result of the conviction.

On the fourth point taken, *Queen-Empress v. Har Chandra Chowdhury* ⁽³⁾ (Banerjee and Wilkins, JJ.) has been cited for the petitioner, Natha, but that ruling is directly opposed to *Queen-Empress v. Man Mohan Lal* ⁽⁴⁾, (Kershaw, C. J., and Burkitt, J.) in which it was held that the production of the conviction and, if necessary, proof of identity, was sufficient evidence for the issue of notice to a surety under Section 514 of the Code of Criminal Procedure, and that it was for the surety to show cause against forfeiture. This is, in my opinion, the correct exposition of the law on the subject, and I concur in the dictum that it is

⁽¹⁾ 1 *Calc., L. R.*, 134.

⁽²⁾ 3 *Calc., L. R.*, 406.

⁽³⁾ 1 *L. R.*, XXV *Calcl.*, 440.

⁽⁴⁾ 1 *L. R.*, XXI *Atl.*, 86.

not incumbent on the prosecution to prove, at the hearing after notice that the principal was properly convicted. In the present case the sureties do not appear to have attempted to prove that the conviction was bad.

The first point taken for the petitioners remains for disposal. In *Emperor v. Nathu Ram, Ram Chandar*, Criminal Revision 2 of 1902, it was held by a Division Bench of this Court that a bond executed under the Code of Criminal Procedure must be strictly construed.

The procedure prescribed for proceedings under Section 107 of the Code differs widely from that prescribed for proceedings under Section 110, the one being the procedure prescribed for summons, and the other being that prescribed for warrant cases.

The Magistrate acted on information which led him to believe that the petitioner, Wadhawa Singh, was a habitual offender, or was so desperate and dangerous as to render his being at large without security hazardous to the community, and the District Magistrate dismissed the appeal against the Magistrate's order on the ground that Wadhawa Singh was a habitual offender, as far as can be gathered from the judgment.

The bond under Section 107 of the Code was obviously executed in consequence of carelessness on the part of the Magistrate responsible, and the error was not, in my opinion, cured by Section 537 of the Code.

The bond executed should not have been executed, and the fact that an offence likely to cause a breach of the peace was committed, while the offender was erroneously bound over to keep the peace in direct opposition to the order that he should be bound over under Section 110, does not, in my opinion, render him liable to forfeiture, the bond being bad by reason of no order for such bond being executed having been passed. Had the offender been called on to show cause against the execution of a bond under Section 107, he might very possibly have succeeded in proving that he did not intend to commit a breach of the peace or a disturbance of the public tranquillity, or any wrongful act which might probably occasion such breach or disturbance, and he should obviously not have been bound over without having an opportunity of tendering evidence on these points.

For the above reasons the order forfeiting the security furnished by Wadhawa Singh was bad and is hereby set aside.

The case of the sureties differs slightly from that of the principal. It was not necessary that they should be parties to the proceedings prior to the execution of the bond, but they were sureties for the compliance with the terms of a bond which was bad. This plea was taken when the sureties were called on to show cause against forfeiture. They are, therefore, in my opinion, not rendered liable by the mere fact that the bond executed by them was under Section 107, the bond executed by them being ancillary to the bond executed by the principal.

For these reasons I set aside the order of forfeiture against the sureties.

Application allowed.

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PARTITION.

Partition—Joint estate—Mortgagee's right to partition—Jurisdiction of Revenue Court—Procedure—Punjab Land Revenue Act, 1887, Sections 11, 115, 117.—Held, that a mortgagee of agricultural land is not as such entitled to claim partition.

Revenue Courts when entertaining application for partition of a mortgagee of agricultural land ought to examine the mortgage-deed, if any, or the record of the oral transaction in the Revenue papers, and, where the mortgagee alleges custom, the *Wajib-ul-arz*. If asked to do so by the mortgagee they may also examine the *Riwaq-i-am*; but they need not go further than this in inquiring as to whether there is such a custom, and if not satisfied that the mortgagee can claim partition either by the express terms of his mortgage or by custom, they should simply reject the claim under Section 115 of the Act.

In such cases it is not the proper procedure to stay proceedings and refer the applicant to a Civil Court under Section 117 (1). It is for the mortgagee to prove his claim in a Civil Court, and if he obtains a decree from that Court, it is the duty of the Revenue Courts to give effect to such a decree. *HIRA SINGH v. DEVI DITTA*

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PUNJAB ALIENATION OF LAND ACT, 1900.

SECTION 2 (3).

And Section 3 (2)—"Land," meaning of—Transfer of his interest in a mortgage (executed before the Punjab Alienation of Land Act came into force) by a mortgagee—Unobjectionable transfer.—In 1876 'A' mortgaged his land to 'B' with liberty to redeem at any time. In 1884 'B' transferred his rights under the mortgage deed to 'C' who, in July 1901, after the Punjab Alienation of Land Act had come into operation, sold his right as mortgagee under the transaction of 1884 to 'D,' a Khatri, who was not a member of an agricultural tribe. The sale-deed having been presented for mutation of names, the Naib-Tahsildar referred the case to the Deputy Commissioner for orders. The latter, considering that the transaction was not permissible under the provisions of the Punjab Alienation of Land Act, treated it as a sub-mortgage; and under Section 9 of the Act revised the terms of the sale-deed, converting the sale into a usufructury mortgage for 20 years, and directed that on the expiration of that term the land should be re-delivered to the original owner. On appeal the Commissioner modified this order to this extent that on the expiration of the term of the mortgage the land should revert to 'C' instead of 'A,' and that if within the period of 20 years 'A' claims redemption he might recover possession from 'D' after payment to him through 'C' such sum less than Rs. 200, as the Deputy Commissioner might fix with regard to the number of years 'D' had been in possession.

Held, that a usufructury mortgage of land which is not occupied as the site of any building in a town or village and is occupied or left for agricultural purposes or for purposes subservient to agriculture or for pasture is land within the meaning of clause (3) of Section 2 of the Punjab Alienation of Land Act, and where permanent alienation of such land has taken place since the said Act came into force, the proper procedure for a Deputy Commissioner is to proceed under Section

The references are to the Nos. given to the cases in the "Record."

No.

PUNJAB ALIENATION OF LAND ACT, 1900—*concl'd.*

3 (2) to sanction or to refuse to sanction the sale, and in case of refusal, fix terms and conditions under Section 14. *Held, further*, that the objects of the Punjab Alienation of Land Act are to encourage thrift and prevent the extravagance which excessive credit suggests and facilitates, and also protect the ignorant zamindars against the wiles of the money-lender and have no bearing at all upon sales of the nature described as having taken place between 'C' and 'D' which are quite harmless or matters of indifference, and therefore such a sale ought to have been sanctioned. *SUKHBASHI RAM v. AKBAR SHAH* ...

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SECTION 9.

1. *Power to revise mortgage made in form not permitted.*—In 1899 'A,' who was a member of an agricultural tribe, mortgaged his land to 'B,' a Khatri. The mortgage was a collateral one and contained provision intended to operate by way of conditional sale on default of repayment of the loan within two years. On default being made no steps were taken to enforce the conditional sale, but the parties agreed that 'B' should take over possession as mortgagee, allowing 'A' to cultivate the land as his tenant subject to payment of rent. The parties then applied for mutation of names, but the Deputy Commissioner, holding that the exchange of possession amounted to a fresh mortgage not permitted by the Punjab Alienation of Land Act, refused to give his sanction to mutation being effected.

Held, that there was no fresh mortgage, but as the position of the parties was not in accordance with the policy of the Act, which on behalf of the members of agricultural tribes aims at the excision of conditions intended to operate by way of conditional sale, the proper procedure for the Deputy Commissioner was to have acted under Section 9 of the Act, by putting the mortgagee to his election whether he would agree to the sale condition being struck out of his deed, and if he agreed to the said condition being excised, the mutation of names should have been effected. *HARJAS v. HARDITTA*

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PUNJAB LAND REVENUE ACT, 1887.

SECTION 111.

And Sections 115, 117—Joint estate—Mortgagee's right to partition—Jurisdiction of Revenue Court—Procedure,

See Partition

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PUNJAB TENANCY ACT, 1887.

SECTION 77 (3) (b).

And Section 77 (4)—Rent—Suit for commutation of rent—Power of Assistant Collector to hear suit for commutation of rent.—A suit for commutation of rent falls under the first group in sub-section 77 (3) (b) of the Punjab Tenancy Act, and under sub-section 4 is not cognizable by an Assistant Collector of the first grade, unless he has been by name specially empowered in that behalf by the Local Government. *JAIMAL SINGH v. SHER KHAN*

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The references are to the Nos. given to the cases in the "Record."

PUNJAB TENANCY ACT, 1887—*concl'd.*

No.

SECTION 84 (5)

Revision—Financial Commissioner's powers of—Discretion.

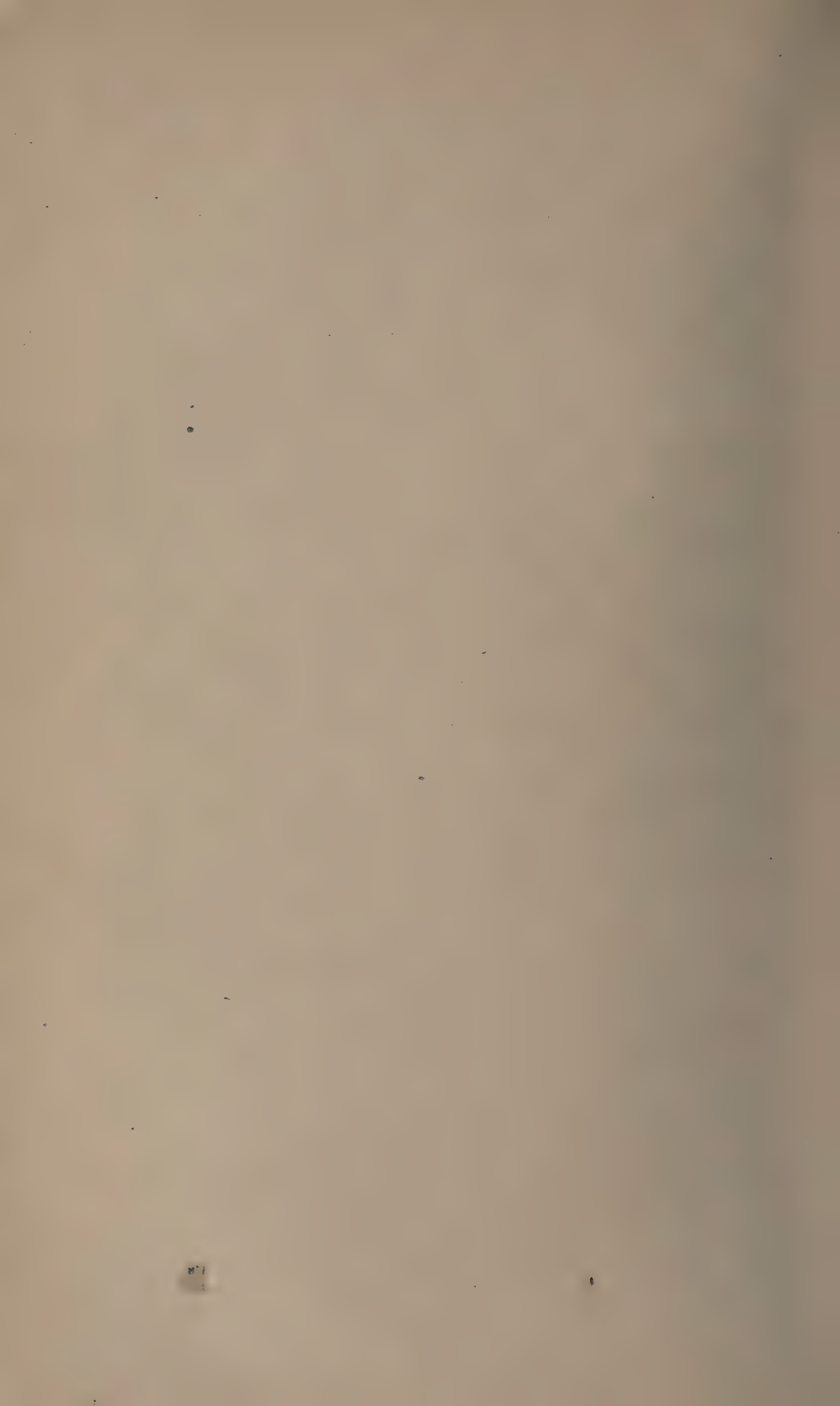
See Revision 5

R.

REVISION IN REVENUE CASES.

*Revision—Financial Commissioner's powers of—Discretion—Punjab Tenancy Act, 1887, Section 85 (5).—*The Financial Commissioner of the Punjab is not bound to interfere on the Revision side, under Section 84 (5) of the Punjab Tenancy Act, even when there is a defect of jurisdiction. He uses his discretionary powers in the interest of justice only in those cases where he is satisfied that his declining to interfere would result in injustice or failure of justice. JAIMAL SINGH v. SHER KHAN ...

5



REVENUE JUDGMENTS.

No. 1.

*Before the Hon'ble C. L. Tupper, C.S.I.,
Financial Commissioner.*

CHUHAR SINGH AND OTHERS,—(PLAINTIFFS),—
PETITIONERS

Versus

JHANDA SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} REVISION SIDE.

Revision No. 184 of 1901-02.

Landlord and tenant—Suit for ejectment of tenant—Right of some of the landlords to maintain such suit—Proper parties.

Although for the purposes of ejectment of a tenant from a joint holding the general rule is that all the co-sharers must either act jointly or must obtain partition, yet in a case where the Court is satisfied that the co-sharers who do not sue are for some reasonable cause not in a position to do so and that the co-sharers who do sue are acting *bonâ fide* in the interests of the absentees as well as in their own, and that the tenants will not be prejudiced on the merits of the case by the decision of the suit in the absence of some of the landlords, *held* that in such a case the general rule need not be applied, especially if it would cause a miscarriage of justice.

*Petition for revision of the order of J. F. Connolly, Esquire,
Collector of Amritsar, dated 8th April 1902.*

Harris, for petitioners.

Vishnu Singh, for respondents.

The following judgment was delivered by—

THE FINANCIAL COMMISSIONER.—The plaintiffs, landlords, sue to eject the defendants, tenants, from 112 kanals 14 marlas in respect of which the tenants are entered in the records of the current Settlement as occupancy tenants under Section 6 of the Act. The basis of the claim is an agreement said to have been made in January 1871 between the representatives of the parties in consequence of a suit, the terms being that the

13th Sept. 1902.

tenants were to hold at revenue rates for thirty years, and that at the end of that period the landlords were to be entitled to possession. This period having now expired, the landlords sue for ejectment. The first Court dismissed the claim with reference to the entries in the records of rights, and mainly because it found that effect had not been given to the agreement, to which it is an obvious answer that apart from the question of mutation of names, the time for giving effect to the agreement, so far as the landlords were to benefit thereby, did not occur till the period of protection was over.

The Collector, though not satisfied that the first Court had fully discussed the merits of the case or grasped the arguments bearing thereon, upheld the order dismissing the suit on the technical grounds that the whole of the co-sharers in the property were not parties to the suit, and that if the co-sharers who had sued desired a remedy they must first obtain partition.

I do not question the general soundness of the doctrine laid down in *Ram Singh and others v. Wadhya* ⁽¹⁾, and *Ghasita and others v. Karm Shah* ⁽²⁾, which may be stated in general terms by saying that for purposes of ejectment joint landlords must either act together and unanimously or, if they cannot agree, must obtain partition, and then proceed as they severally think fit with reference to their separated shares. But a doctrine of this kind must not be so blindly applied as to occasion a miscarriage of justice. In this case seven out of nine co-sharers sued and the other two were absent in Burma, and all the co-sharers are related to each other in the male line. It is a very general assumption on the part of the peasantry in the Punjab that in the absence of such a relative his brother may act for him. The assumption may, no doubt, be often in conflict with the individualising tendencies of our whole system of law and procedure: and it is open to the obvious remark that family quarrels may be as frequent and as violent here as elsewhere. But where, as in this case there is no reason to suppose that there is any dissension, and there is reason to believe that the co-sharers present are *bonâ fide* acting also in the interests of the co-sharers who are absentees, I think it would be inequitable not to give effect to the prevailing sentiment: and I think we should do right to avoid the sense of injustice which the dismissal of such a suit as this on the technical ground under discussion would certainly, and I myself think not without reason, arouse.

(¹) 19 P. R., 1886. (²) 16 P. R., 1887.

What exceptions should be grafted in the general rule that all the landlords of the holding must either join to eject or must obtain partition, is a question which it would not be wise to attempt to deal with exhaustively. I will only say that before an exception is made the Court must be satisfied that the co-sharers who do not sue are, for some reasonable cause, not in a position to do so, that the co-sharers who do sue are acting *bonâ fide* in the interests of the absentees as well as in their own interests, and that the tenants will not be prejudiced on the merits of the case by the decision of the suit in the absence of some of the landlords. All these conditions are present here. I therefore set aside the order of the Collector and direct him to restore the appeal to his file and proceed to dispose of it on the merits. No order as to costs, the point for decision being open to doubt.

Application allowed.

No. 2.

*Before the Hon'ble C. L. Tupper, C.S.I.,
Financial Commissioner.*

CHAHAT,—(PLAINTIFF),—APPELLANT,

Versus

MURAD ALI,—(DEFENDANT),—RESPONDENT.

APPELLATE SIDE.

Appeal No. 75 of 1901-02.

Lambardar—Right of heir to succeed—Disqualification.

Held, that the claim of the heir of a lambardar should not be passed over on the sole ground that his holding in the village is very insignificant, if he has property in another village sufficient to secure the revenue for which he would be responsible.

Under Land Revenue Rule No. 177 (iii) (c), absence from the village is not a disqualification unless the effect of the absence is that he is unable to discharge the duties of the office.

Appeal from the order of T. Gordon Walker, Esquire, Commissioner, Delhi Division, dated 13th August 1902.

Prem Lal, for appellant,

Jugal Keshor, for respondent.

The following judgment was delivered by—

THE FINANCIAL COMMISSIONER.—The villages of Lubinga 14th Jan'y. 1903.
Kalan and Jakh are about half a mile apart. In Lubinga Meos predominate. Jakh is almost entirely owned by fakirs. At settlement there were 4 lambardars of Jakh, all fakirs. Umed Khan, a Meo of Lubinga, purchased the land of one of the lambardars and became lambardar. The other three appointments have

been combined into one which is now held by Murad Ali, fakir, who is responsible for Rs. 92 out of a total demand of Rs. 122.

Umed Khan has died, and his eldest son, Kanhiaya, has been appointed lambardar of Lubinga.

On 8th February 1902, Mr. Hamilton, the Collector, proposed that the vacant *lambardari* in Jakh should be brought under reduction.

On this I passed the following order :—

“ According to the pedigree table Umed Khan, deceased lambardar, had four sons. If the three sons besides Kanhiaya are dead or ineligible, or if dead have left no eligible descendants, I agree to the reduction of the *lambardari* now vacant in consequence of the death of Umed Khan.”

The effect of this order was to leave the right of succession of any of the three other sons of Umed Khan or their descendants unaffected.

Dewan Tek Chand succeeded Mr. Hamilton as Collector, and on 20th February 1902 appointed Chahat, a minor, but the eldest of the three other sons of Umed Khan, to be lambardar of Jakh, with Mir Dal, his cousin, as his *sarbarah*.

The Commissioner has set aside this order holding Chahat to be ineligible because he has inherited from his father less than one *kachha bigha* in Jakh though he has other property in Lubinga.

In Lubinga Chahat owns about 8 *kachha bighas* worth some Rs. 150, which is ample security for the revenue, for which he will be responsible.

The fact that this property is not in Jakh is in my opinion immaterial. Under Section 77 of the Punjab Land Revenue Act we can proceed against it in case of default in Jakh. The Government therefore has security for the payment of the revenue, and that is enough as there is no other reason for considering Chahat ineligible. The fakirs object to having a Meo lambardar, but that is no reason for depriving Umed Khan's family of their rights. Chahat lives in Lubinga, but under Land Revenue Rule 177 (iii) (c) absence from the estate is a disqualification only if for that reason the lambardar is unable to discharge the duties of his office. The reason fails here because the two villages are only half a mile apart.

I think the Commissioner's order is mistaken, and I set it aside and restore that of Dewan Tek Chand, the Collector.

Appeal allowed.

No. 3.

Before the Hon'ble C. L. Tupper, C. S. I., Financial
Commissioner.

FAKERIA, — PETITIONER,

Versus

MUNGA, — RESPONDENT.

APPELLATE SIDE.

Revision No. 199 of 1901-02.

*Lambardar—Dismissal—Removal of cause of disqualification—Right
for re-appointment.*

Indebtedness is a sound reason for dismissing a lambardar, but where the dismissed person removes the cause of his disqualification before a fresh appointment is made there is no bar to his re-appointment if there may be some advantage in it as it is expedient to avoid changing lambardars.

Semle : Indebtedness of a lambardar does not justify his dismissal where there is sufficient security for the recovery of the revenue for which he is responsible, and the needful security may be provided by gifts of lands to the lambardar even if unaccompanied by possession.

*Petition for revision of the order of T. Gordon Walker, Esquire,
Commissioner, Delhi Division, dated 26th January 1902.*

Rushtin, for respondent.

The following judgment was delivered by—

THE FINANCIAL COMMISSIONER —The proceedings of May 18th Jany. 1903. 23rd, 1900, were misdescribed by Fakeria, applicant, as a review. What really happened was that Fakeria was dismissed for indebtedness on 8th March 1900, and against that order he made no appeal. On 23rd May 1900 the Collector appointed Munga in place of Fakeria, dismissed. This was a fresh order, not a review. Against this order Fakeria appealed within time and his appeal was rejected.

In my opinion there were sufficient reasons for re-appointing Fakeria notwithstanding his dismissal. There is nothing against him except indebtedness, and during the course of the case he has, by redeeming property and obtaining gifts from his relatives, acquired unincumbered property of the value of Rs. 1,078 or thereabout. This is approximately sufficient.

As to the gifts the Revenue Assistant reports as follows :—
“ There is no doubt that these gifts have all been made for the
“ purpose of saving the *lambardari* in the family, but otherwise
“ there seems to be no reason to doubt their genuineness. All the
“ donors testify to these gifts, and mutations have been effected in
“ all. The appellant now seems to be free from all debts, and it

“is clear that his *status* has been much improved since his “appointment as lambardar.”

Indebtedness is no doubt a perfectly sound reason for dismissing a lambardar, but if the punishment rouses him as here to exertions and he removes the cause of his disqualification before another man is appointed in his place, I see no reason why he should not be re-appointed. It is not wise to move a *lambardari* even from one line to another in the same family. Bad blood is engendered and the seeds are sown of future disputes.

In these cases of indebtedness the essential point is, what security have we for the payment of the Government revenue? If the gifts operate to give us that security the motives for which they are made are not material. Here the motive was to keep the *lambardari* in the hands of the lambardar. That is a perfectly legitimate motive in my opinion, and the existence of the motive does not to my mind suggest that the transactions are for any purpose which we need regard fictitious. It may be that enjoyment remains as before but that is of no consequence if we have the security. Even collateral security may be accepted in these cases much more the legal transfer of proprietary right though unaccompanied by possession.

The orders of the officers below appear to me to proceed on a mistaken view of the interests of Government and the expediency of the case. It is inexpedient to change lambardars if a change can be avoided. If for whatever cause there is sufficient security for the recovery of the revenue for which the lambardar is responsible the lambardar should not be dismissed for indebtedness. We are not concerned with his commercial morality but with the fiscal interests of Government. When a man has been dismissed for indebtedness and hastens to remove the cause of his disqualification a lenient view should be taken of his case, and if he cures his disqualification before the interests of other parties are affected by the appointment of some one else, there is no objection to his re-appointment and some advantage in allowing it.

For these reasons, I set aside the orders of the officers below and re-appoint Fakeria to be lambardar of the three villages. I have warned him that if he again incurs debt which will impair his responsibility for the payment of revenue, he will be again dismissed without further hope of re-instatement.

Application allowed.

No. 4.

Before the Hon'ble C. L. Tupper, C. S. I., Financial
Commissioner.

HIRA SINGH AND OTHERS,—(DEPENDANTS),—
APPELLANTS,

Versus

DEVI DITTA AND ANOTHER,—(PLAINTIFFS),—
RESPONDENTS.

} REVISION SIDE.

Revision No. 284 of 1901-02.

*Partition—Joint estate—Mortgagee's right to partition—Jurisdiction of
Revenue Court—Procedure—Punjab Land Revenue Act, 1887, Sections
111, 115, 117.*

*Held, that a mortgagee of agricultural land is not as such entitled to
claim partition.*

Revenue Courts when entertaining application for partition of a mortgagee of agricultural land ought to examine the mortgage deed if any, or the record of the oral transaction in the revenue papers, and, where the mortgagee alleges custom, the *Wajib-ul-arz*. If asked to do so by the mortgagee they may also examine the *riwaj-i-am*; but they need not go further than this in inquiring as to whether there is such a custom, and if not satisfied that the mortgagee can claim partition either by the express terms of his mortgage or by custom they should simply reject the claim under Section 115 of the Act.

In such cases it is not the proper procedure to stay proceedings and refer the applicant to a Civil Court under Section 117 (1). It is for the mortgagee to prove his claim in a Civil Court, and if he obtains a decree from that Court it is the duty of the Revenue Courts to give effect to such a decree.

Har Dial v. Hakim (1), followed.

Mangli Prasad v. Ishri Prasad (2), and *Ranjha v. Mussammat Rajji* (3), referred to.

*Case referred by T. Gordon Walker, Esquire, Commissioner of Delhi
Division, on 20th August 1902.*

The following judgment was delivered by—

The FINANCIAL COMMISSIONER.—This is a case referred by 20th April 1903.
the Commissioner, Delhi Division, under Section 16 of the Land
Revenue Act, for revision by the Financial Commissioner.

The question of principle which calls for decision is whether
a mortgagee of agricultural land as such is entitled to claim
partition.

(1) 11 P. R., 1885, Rev.

(2) I. L. R., XVIII All., 476.

(3) 22 P. R., 1878.

The particular case presents features which are only too familiar. The mortgagors are Jats and the mortgagees Khatries. In 1889 the Jats mortgaged with possession three-fourths of a holding of 51 bighas 11 biswas to the Khatriis for Rs. 1,290, made up of a sum due on a previous mortgage, amount due on bonds and interest. The new mortgage debt did not carry interest, but the Khatries were to take the profits of the land and pay the revenue without rendering an account. The mortgagors remained on the land as tenants of the mortgagees: and in 1892 executed a further deed charging the same lands with Rs. 371, the amount of additional debt due chiefly for arrears of rent but mostly included a decree of Court and a fresh bond. This additional charge was to bear interest at 6 per cent. per annum.

The Jats alleged that they never received more than Rs. 350, and that the rest of the formidable mortgage debt now standing against them, *viz.*, Rs. 1,661, is composed of interest.

It is clear enough that the Khatriis have had trouble in realising their rents. In 1892 a *Chakota* of Rs. 100 a year was agreed upon, but this has not been regularly paid. The Khatriis lately served the Jats with a notice of ejectment under the Tenancy Act; the Jats sued to contest the notice but without success, and their appeal on this point to the Collector was rejected.

Devi Ditta, Khatri, represents before me that the Jats cultivate the land and that he can get nothing out of them. His obvious remedy is to execute his decree for their ejectment and to put in tenants who will pay their rent.

To partition the Khatriis are not entitled.

In *Har Dial v. Hakim* ⁽¹⁾, it was held by Sir William Davies, Financial Commissioner, that although the rules made under the old Punjab Land Revenue Act of 1871 entitled any proprietor of a joint estate or a portion of a joint estate to apply for partition of the land held by him in joint ownership, the privilege did not by those rules extend to a mortgagee. According to that decision the claim of a mortgagee to partition must be established in a Civil Court before a Revenue Officer can give effect to it.

Referring only to the case of agricultural land I think this decision is a just and reasonable one in itself and sustainable under the present law. In most cases, where, as here, the mortgagor remains on the land as tenant of the mortgagee, the latter has, as already shown, remedies without partition. He can sue

(1) 11 P. R., 1885, Rev.

for arrears of rent or cause the ejectment of the tenant. A mortgagee making as such a claim to partition must show that the right of partition (which is one of several rights forming in combination with each other proprietary right) has come to him in consequence of his mortgage. He could acquire such right by express stipulation in the mortgage deed, by operation of law, or by custom; and there may be circumstances also under which a civil Court might grant him the right on grounds of justice, equity and good conscience.

In the case before me the mortgage deeds are entirely silent on the subject of partition, and there is no suggestion that the *riwaj-i-am* or *wajib-ul-arz* or custom, however it might be proved, entitles a mortgagee to partition. I do not therefore direct any inquiry on the point more especially because I think it very unlikely that any such custom exists; but of course if such custom were alleged at least the *riwaj-i-am* and *wajab-ul-arz* should be referred to.

As to the operation of law a "land owner," as defined in Section 3 (2) of the Land Revenue Act, includes a mortgagee with possession but not a collateral mortgagee who is not in the enjoyment of any part of the profits of an estate. The object of this provision is clear from Section 61 of that Act under which the land-owners are liable for the land revenue assessed on the estate. But when we look to Section 111 of the Act which declares what persons may apply for partition, we find that the term land-owner is not used. In lieu of it we have the expression "any joint owner of land." This, I hold, does not include a mortgagee, and on the point now in question the amendment of the law effected in 1887 has left it in the condition in which it was when Sir William Davies passed his decision in 1885.

It is true that for mutation purposes a person acquiring by mortgage any right as a land-owner in an estate must make his report to the patwari, but a mortgagee may be a land-owner for the general purposes of the Act without being a joint owner of land for purposes of partition.

I have considered the case of *Mangli Prasad v. Ishri Prasad* ⁽¹⁾, but that was a case between mortgagees where the mortgagors were not parties, and is only so far material in that it shows that if a mortgagee were allowed to claim partition, his mortgagor might be prejudiced at the time of redemption, as what might

(1) I. L. R., XVIII All., 476.

come to the mortgagee on partition might not be the full equivalent of what was mortgaged to him.

While I am thus clear that revenue officers should not recognise the claim of a mortgagee of agricultural land as such to have partition, I do not deny that hard cases might arise in which the mortgagor might use this disability of the mortgagee to deprive him of something to which he was entitled under the mortgage. In such a case the mortgagee should go to the civil Court, and, if the civil Court granted him a decree for partition, it would be the duty of the revenue officer to give effect to the decree. I observe that in *Ranja v. Mussammot Rajji* ⁽¹⁾, Mr. Justice Plowden held that although the widow who claimed partition in that case had no right to compel it at her pleasure, yet on grounds of justice, equity and good conscience it was in the discretion of the Court to allow her partition where the defendants who were bound to provide her with proper maintenance, failed in that duty.

It remains to notice how revenue officers should proceed in cases such as that now before me.

When a mortgagee of agricultural land as such applies for partition they should examine the mortgage deed, if any, or the record of the oral transaction in the revenue papers, and, if there is no express agreement that the mortgagee is entitled to partition, they should ordinarily refuse the application as Section 115 of the Act enables them to do. If the mortgagee alleges custom they should refer to the *wajib-ul-arz*, and, if asked to do so, the *riwaj-i-am*. They need not go further than this in inquiring into custom as if there is doubt it is for the mortgagee to prove his case in a civil Court. If the revenue officer is not satisfied that any custom exists conferring on mortgagees the right of claiming partition, he should, as when no such allegation is made, reject the claim. He should not stay proceedings and refer the applicant to a civil Court under Section 117 (1); as in most cases there would be no equitable reason for the grant of a decree for partition and to suggest a suit to the applicant would usually be to foster fruitless litigation. If not satisfied that the mortgagee can claim partition by the express terms of his mortgage or by custom the revenue officer should simply reject the claim leaving the mortgagee to take such other measures as may be open to him.

I follow that course here and reject the claim of the Khatris to partition.

(¹) 22 P. R., 1878.

No. 5.

*Before the Hon'ble Sir Lewis Tupper, K.C.I.E., C.S.I.,
Financial Commissioner.*

JAIMAL SINGH AND OTHERS,—(PLAINTIFFS),—
PETITIONERS,

Versus

SHER KHAN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} REVISION SIDE.

Revision No. 72 A of 1901-02.

*Rent—Suit for commutation of rent—Power of Assistant Collector to hear
suit for commutation of rent—Revision—Financial Commissioner's powers of
—Discretion—Punjab Tenancy Act, 1887, Sections 77 (3) (b), 77 (4), 84 (5).*

A suit for commutation of rent falls under the first group in sub-section 77 (3) (b) of the Punjab Tenancy Act and under sub-section 4 is not cognizable by an Assistant Collector of the first grade, unless he has been by name specially empowered in that behalf by the Local Government.

The Financial Commissioner of the Punjab is not bound to interfere on the Revision side, under section 84 (5) of the Punjab Tenancy Act, even when there is a defect of jurisdiction. He uses his discretionary powers in the interest of justice only in those cases where he is satisfied that his declining to interfere would result in injustice or failure of justice.

Hansa v. Ran Singh (1) approved and followed.

Petition for revision of the order of J. P. Thompson, Esquire, Collector, Montgomery, dated 12th September 1901.

Kharak Singh, for petitioners.

Gopal Chand, for respondents.

The following judgment was delivered by

THE FINANCIAL COMMISSIONER.—This is an application for revision of an order dismissing a suit for commutation of rent in cash to rent in kind. I do not think it is necessary to set out the facts of the claim or the reasons why I fully concur with the Courts below in holding that Section 13 of the Tenancy Act applies; and that the consent of the tenants being refused the commutation prayed for cannot be granted. The case was adequately investigated and has been justly dismissed. The only reason I admitted it to a hearing was that an examination of the proceedings disclosed a manifest defect in jurisdiction.

27th April 1903.

(1) 36 P. R., 1902, F. B.

The case falls under the first group in sub-section 77 (3) (b) of the Tenancy Act. Cases under that sub-section may be heard only by the Collector or an Assistant Collector of the first grade, who has by name been specially empowered in this behalf. The officer who passed the original order dismissing the suit was Mirza Sultan Ahmad, an Assistant Collector of the first grade, who has not been so empowered. His order, therefore, is without jurisdiction.

The counsel for the applicant cited *Shri Sidheshwar Pandit v. Shri Harihar Pandit* ⁽¹⁾, *Keshav v. Vinayak* ⁽²⁾, *Velayudam v. Arunachala* ⁽³⁾, *Narain Das v. Kotu Mal* ⁽⁴⁾, and *Keshava Sana-bhaga v. Lakshminayarana* ⁽⁵⁾, from which it may be gathered that the parties cannot by consent cure a defect in jurisdiction; that an objection on the ground of jurisdiction may be taken in the last Court even if it has not been taken in the Courts below; that the Court, whenever such an objection is raised, is bound to have regard to it; and that if a defect of jurisdiction is established the proceedings must be set aside.

It is not for the Financial Commissioner as a Court of revision to discuss the expediency of such a law. I will only say that I am very glad to be able to decide that the Financial Commissioner of the Punjab is not bound to act upon it. Under Section 84 (5) of the Tenancy Act the Financial Commissioner of the Punjab may interfere "on any ground on which the Chief Court in the exercise of its revisional jurisdiction may, under the law for the time being in force, interfere with the proceedings, or an order or decree of a Civil Court." I have therefore to look to Section 70 of the Punjab Courts Act.

In a recent Full Bench ruling, *Hansa v. Ran Singh* ⁽⁶⁾, Mr. Justice Chatterji observed: "I am of opinion that the wording of Section 70 (a) of the Punjab Courts Act and of Section 622, Civil Procedure Code, appear to give this Court a wide discretion, and that we are not necessarily bound to interfere even when there is a defect of jurisdiction. The powers given by these sections are plenary and are to be used at the discretion of the Court, for remedying errors committed by the subordinate Courts, with the object of furthering the ends of justice. I do not think we are bound to interfere, even in a case in which a defect in jurisdiction is established unless we are satisfied that our

(1) *I. L. R.*, XII Bom., 155.

(2) *I. L. R.*, XXIII Bom., 22.

(3) *I. L. R.*, XIII Mad., 273.

(4) 132 *P. R.*, 1883.

(5) *I. L. R.*, VI Mad., 192.

(6) 36 *P. R.*, 1902, F. B.

"declining to interfere would lead to an injustice or failure of justice."

CLARK, C. J., and REID, J., concurred.

In these remarks I cordially agree and I am glad to take the opportunity of declaring them to be applicable in Revenue Court cases.

Applying them in the present case, I hold that not only would there be no failure of justice in declining to interfere—for the Assistant Collector dealt with the case well and the decision is quite satisfactory—but there would be positive injustice to the parties in compelling them to go through the litigation again, only to lead, after further expense and trouble, to the same result.

I dismiss the application. No order as to costs, the question of jurisdiction being a proper one for decision.

Application dismissed.

No. 6.

*Before the Hon'ble Sir Lewis Tupper, K.C.I.E., C.S.I.,
Financial Commissioner.*

SUKHBASHI RAM,—(PLAINTIFF),—APPELLANT,

Versus

AKBAR SHAH,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Appeal No. 1 of 1902-03.

Punjab Alienation of Land Act, 1900, Sections 2 (3), 3 (2)—"Land," meaning of—Transfer of his interest in a mortgage (executed before the Punjab Alienation of Land Act came into force) by a mortgagee—Unobjectionable transfer.

In 1876 'A' mortgaged his land to 'B' with liberty to redeem at any time. In 1884 'B' transferred his rights under the mortgage deed to 'C,' who in July 1901, after the Punjab Alienation of Land Act had come into operation, sold his rights as mortgagee under the transaction of 1884 to 'D,' a Khatri, who was not a member of an agricultural tribe. The sale-deed having been presented for mutation of names the Naib-Tahsildar referred the case to the Deputy Commissioner for orders. The latter considering that the transaction was not permissible under the provisions of the Punjab Alienation of Land Act treated it as a sub-mortgage; and under Section 9 of the Act revised the terms of the sale-deed, converting the sale into a usufructuary mortgage for 20 years, and directed that on the expiration of that term the land should be re-delivered to the original owner. On appeal the Commissioner modified this order to this extent that on the expiration of the term of the mortgage the land

should revert to 'C' instead of 'A,' and that if within the period of 20 years 'A' claims redemption he might recover possession from 'D' after payment to him through 'C' such sum less than Rs. 200 as the Deputy Commissioner might fix with regard to the number of years 'D' had been in possession.

Held, that a usufructuary mortgage of land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture is land within the meaning of clause (3) of Section 2 of the Punjab Alienation of Land Act, and where a permanent alienation of such land had taken place since the said Act came into force, the proper procedure for a Deputy Commissioner is to proceed under Section 3 (2) to sanction or to refuse to sanction the sale, and in case of refusal to fix terms and conditions under Section 14.

Held, further, that the objects of the Punjab Alienation of Land Act are to encourage thrift and prevent the extravagance which excessive credit suggests and facilitates, and also to protect the ignorant zamindars against the wiles of the money-lender and have no bearing at all upon sales of the nature described as having taken place between 'C' and 'D' which are quite harmless or matters of indifference, and therefore such a sale ought to have been sanctioned.

*Appeal from the order of the Commissioner of Lahore Division,
dated 1st April 1903.*

The following judgment was delivered by

9th October 1903.

THE FINANCIAL COMMISSIONER. — In 1876, Mohkam Din, an Arain, (his heir therefore being now a member of an agricultural tribe), mortgaged the land in question to Dhundi, an Afghan, and Mussammat Begam, Shekh, for Rs. 231, with liberty to redeem at any time. The mortgage was a usufructuary one.

In 1884, Dhundi Khan and Mussammat Begam transferred their rights under the mortgage deed to Akbar Shah, Mohkam Din's right of redemption being unaffected.

Finally, on 3rd July 1901, after the Alienation of Land Act had come into operation, Akbar Shah (a member of an agricultural tribe) sold his right as mortgagee under the transaction of 1884 to Sukhbashi Ram, Khatri, who is not a member of an agricultural tribe and not an agriculturist within the meaning of the Act in the village where the land is situated.

Such being the facts, the case came up before the Naib-Tahsildar for mutation of names and he referred it for orders. The following orders were then passed by the Deputy Commissioner, Mr. Atkins, and the Commissioner, the Hon'ble Mr. Alex. Anderson.

Order by the Deputy Commissioner, dated 29th October 1902.

" Looking at the definition of land in Section 2 (3) of Act XIII of 1900, I think that a right of usufructuary mortgage is 'land' as it is a right to receive rent

" Therefore the sub-mortgage of August 1901 is not permissible and must be dealt with under Section 9. Akbar Shah is a Sayad, a member of an agricultural tribe, while the ultimate mortgagee is not a member of an agricultural tribe.

" I do not think Akbar Shah is entitled to any consideration as he has transferred his rights in the land, and I would give Sukhbashi Ram the most favourable terms possible, *i.e.*, an usufructuary mortgage for 20 years.

" But I am not sure whether after that time the land should revert to Akbar Shah or to the original owner Mohkam Din, or rather his son-Nur Din.

" The Section 6 (1) (a) says it shall be re-delivered to the mortgagor, but I don't see why Akbar Shah should get it; he has merely passed on his right of mortgage, and he again can be ejected by Dhundi if the latter sues for redemption. In justice the land should revert to the original owner, the first mortgagor. There is no recognised procedure by which I can refer the point, so that I must decide it leaving it to any party aggrieved to appeal.

" I direct that on the expiration of 20 years the land shall be re-delivered to the owner."

Order by the Commissioner, dated 1st April 1903.

" The land concerned in this case was first mortgaged by Mohkam Din, to Dhundi Khan (Afghan) and Mussammat Begam (Shekh) with possession for Rs. 231, not to be redeemed until the whole mortgage money (Rs. 231) was paid. This was in 1876. In 1884, they transferred all their rights for Rs. 231 to Akbar Shah, who became practically the mortgagee of Mohkam Din, by a deed of sale.

" Now Akbar Shah has by a deed of sale, dated 3rd July 1901, sold to Sukhbashi Ram, all his rights as mortgagee in consideration of Rs. 200. Akbar Shah is a Sayad, and Sukhbashi Ram is a Khatri, and an owner in the village only from 1892, and in the Lahore District Sayads are members of an agricultural tribe, and Khatri are not.

" The Collector has decided that the mortgage rights are 'land' within the meaning of Section 2 (3) of the Alienation of Land Act, and in this I agree with him, but I am not able to follow him in the rest of his order. The deed of sale conveying the mortgage rights to the appellant was duly registered, which according to my view of the case it should not have been. And it was presented for mutation of name, that is, that the name of Akbar Shah should be struck out as mortgagee in possession and the name of Sukhbashi Ram substituted. The Naib-Tahsildar properly described the

transaction as a sale between a Sayad and a Khatri, and mentioned that the vendee refused to agree to a mortgage for 20 years. He submitted the case to the Deputy Commissioner for orders. He treated the transaction as a sub-mortgage under Section 9, and ordered that the appellant should have possession as a usufructuary mortgage for 20 years, in accordance with Section 6 (1) (a), after which period the land should revert to the original owner. Now even if the transaction had been a temporary alienation as the Deputy Commissioner considered it, this procedure is not quite in accordance with Circular letter No. 3441, dated 5th June 1901.

"The mutation should have been refused under Notification 23, dated 22nd May 1901, paragraph 1 (2).

"The Naib-Tahsildar properly treated the case as a permanent alienation as far as Akbar Shah was concerned, and referred the case under paragraph II (1) for the Deputy Commissioner's orders. The latter should have proceeded under Section 3 (2) and having refused sanction to the sale, he should have passed an order under Section 14.

"The Deputy Commissioner could have passed under this section the very order he has passed under Section 9 (1). The Deputy Commissioner has allowed Sukhbashi as much as he could. The sale to Sukhbashi had to be cancelled, and he has got a mortgage for 20 years, the maximum that could be allowed. At the end of that time he will cease to have any rights over the land.

"The question arises what will become of it. I agree with the Deputy Commissioner that if the sale to Sukhbashi had been allowed to stand, Akbar Shah would have ceased to have any rights, and Sukhbashi would have become the mortgagee of Mohkam Din.

"But the sale is cancelled, and in accordance with the last words of Section 6 (1) (a) the rights to hold the land after Sukhbashi should revert to Akbar Shah. To this extent the Deputy Commissioner's order requires to be amended.

"A difficulty will arise if Mohkam Din should wish to redeem the mortgage within the 20 years, for in that case Sukhbashi would not be entitled to possession for the whole time. If Mohkam Din wishes to redeem, it must be by payment to Akbar Shah who is still his mortgagee; but Akbar Shah cannot redeem within 20 years according to the Deputy Commissioner's order, and provision must be made for the contingency however unlikely. I therefore add the condition under Section 14 that if within the period of 20 years Mohkam Din claims redemption, he may recover possession from Sukhbashi after payment to him through Akbar Shah such sum less than Rs. 200 as the Deputy Commissioner may fix with regard to the number of years Sukhbashi has been in possession, and the amount of principal and interest which he may be considered to have realized by such possession, the whole principal and interest being liquidated by 20 years' possession. To this extent the order of the Deputy Commissioner is modified."

I have no doubt that a usufructuary mortgage of land which is not occupied as the site of any building in a town

village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture" is 'land' within the meaning of Section 2 (3) of the Alienation of Land Act because it includes a right to receive rent.

What happened on July 3rd, 1901, was therefore not a mortgage by a member of an agricultural tribe in a manner or form not permitted by or under the Act but a sale of 'land' which could not, however, take effect as a sale without the sanction of the Deputy Commissioner. I agree therefore with the Commissioner that the Deputy Commissioner ought not to have proceeded under Section 9 to revise and alter the mortgage; for the real mortgage in this case, which remains unaltered though the parties to it have changed, was made in 1876. The Deputy Commissioner should have proceeded under Section 3 (2) to sanction or to refuse to sanction the sale. Furthermore the Commissioner is quite correct in holding that if the Deputy Commissioner refused sanction his next proceeding should have been to fix terms and conditions under Section 14.

But while I think that the Commissioner has indicated the right procedure, I am unable to agree with him or with the Deputy Commissioner as to the substance of their decision.

In the first place, except as provided in Section 9 (2) and (3) in the case of mortgages in which there is a condition intended to operate by way of conditional sale, the Act has no retrospective effect upon mortgages and gives no power to revise and alter mortgages made before it came into force. In substance the Deputy Commissioner and Commissioner do revise and alter a mortgage made in 1876, and this they had, in my opinion, no power to do.

Secondly, the Act is restrictive and by design in conflict with the usual principle that alienations are economically for the good of both parties and tend to bring lands into the hands which can make best use of them. In considering therefore whether sanction should or should not be given under Section 3 (2) the main question is what does the policy of the Act require? We are not to oppose transactions which, so far as the policy of the Act is concerned, are quite harmless or matters of indifference.

I agree with the Deputy Commissioner that Akbar Shah does not require any particular consideration. He seems a well-do person, well able to take care of himself. The objects of the Act, namely, to encourage thrift, prevent the extravagance

which excessive credit suggests and facilitates and protect the ignorant zamindars against the wiles of the money-lender, have really no bearing at all upon this sale by Akbar Shah. It is true that he is a member of an agricultural tribe and his purchaser is not. But with this land Akbar Shah had only a casual connection. It was not his ancestral property. He was the mortgagee only and quite ready to part with his interest. If regard be had to the policy of the Act we should look, as in fact both Deputy Commissioner and Commissioner have done, to the eventual restoration of the land to the heirs of the original Arain mortgagor. It is the Arains, not the Sayads, who should, at a proper time, get back the land.

For these reasons I think the sale by Akbar Shah to Sukhbashi Ram ought to have been sanctioned; and I sanction it and direct that mutation of names be carried out accordingly. The effect is that Akbar Shah ceases, as he should, to have any connection with the land and that the original mortgage holds good, the heir of Mohkam Din having as against Sukhbashi Ram precisely the same right of redemption that Mohkam Din himself had against the first mortgagees.

Appeal allowed.

No. 7.

*Before the Hon'ble Sir Lewis Tupper, K. C. I. E., C. S. I.,
Financial Commissioner.*

HARJAS AND ANOTHER,—PETITIONERS,

Versus

HARDITTA AND ANOTHER,—RESPONDENTS.

Revision No. 3 of 1902-03.

Punjab Alienation of Land Act, 1900, Section 9—Power to revise mortgage made in form not permitted.

In 1899 'A,' who was a member of an agricultural tribe, mortgaged his land to 'B,' a Khatri. The mortgage was a collateral one and contained provisions intended to operate by way of conditional sale on default of repayment of the loan within two years. On default being made, no steps were taken to enforce the conditional sale, but the parties agreed that 'B' should take over possession as mortgagee allowing 'A' to cultivate the land as his tenant subject to payment of rent. The parties then applied for mutation of names, but the Deputy Commissioner holding that the exchange of possession amounted to a fresh mortgage not permitted by the Punjab Alienation of Land Act, refused to give his sanction to mutation being effected.

REVISION SIDE. }

Held, that there was no fresh mortgage but as the position of the parties was not in accordance with the policy of the Act, which on behalf of the members of agricultural tribes aims at the excision of conditions intended to operate by way of conditional sale, the proper procedure for the Deputy Commissioner was to have acted under Section 9 of the Act by putting the mortgagee to his election whether he would agree to the sale condition being struck out of his deed, and if he agreed to the said condition being excised the mutation of names should have been effected.

*Petition for revision of the order of W. A. LeRossignol, Esquire,
Collector of Jullundur, dated 16th October 1902.*

The following judgment was delivered by

THE FINANCIAL COMMISSIONER.—On March 6th, 1899, Harditta 9th October 1903.
and Indar, Jats, mortgaged certain lands and houses to Harjas and Labhu, Khattris, for Rs. 898. The mortgage was a collateral one and contained provisions intended to operate by way of conditional sale and enforceable if the principal of the debt was not repaid within two years. The principal has not been repaid and no steps have been taken to enforce the conditional sale, but by agreement of the parties the mortgagees have come into possession of the land and Indar and Harnam (acting apparently on behalf of his father) have taken the land on lease from them as their tenants subject to payment of rent for one year which has expired. Before me the parties agree to continue this arrangement.

In consequence of the transfer of possession above referred to the parties applied for mutation of names.

The Naib-Tabsildar on 9th September 1902 refused mutation on the grounds that the mortgagees do not belong to an agricultural tribe, that possession was taken after Act XIII of 1900 came into force, and that no fresh sanction of the Deputy Commissioner had been obtained.

The Naib-Tabsildar probably did not quite understand the Act. A Deputy Commissioner cannot sanction a mortgage at variance with the Act, but if a mortgage is made by a member of an agricultural tribe at a date subsequent to the commencement of the Act in any manner or form not permitted thereby, the Deputy Commissioner, under Section 9 (1), can revise the terms of the mortgage so as to bring it into accordance with a permitted form.

The Deputy Commissioner, apparently holding that the exchange of possession above described in substance amounted to a fresh mortgage in a form not permitted by the Act, upheld

the order of the Naib-Tahsildar refusing sanction to the mutation.

Under the whole circumstances I think it was proper to refuse mutation though not for any of the reasons given above. I do not think there was any fresh mortgage, but the case was such that the position of the parties was not in accordance with the policy of the Act, which, on behalf of members of agricultural tribes, aims at the excision of conditions intended to operate by way of conditional sale when they come to notice in the usual course of business.

Sections 9, 19 and 23 of the Act give me all powers necessary to deal with the case.

I have put the mortgagees to their election under Section 9 (2), and they elect for the conditions intended to operate by way of conditional sale being struck out of their mortgage-deed.

So far as relates to land comprised in the deed which is land as defined in the Alienation of Land Act, I order that the mortgage-deed be read without such conditions. In other respects it remains the record of a subsisting mortgage unaffected by these proceedings.

The parties having agreed that the mortgagees shall remain in possession and that the mortgagors shall continue to be their tenants of the land, mutation of names should now be effected accordingly under Section 37 (b) of the Land Revenue Act.

It will be observed that the situation has now been regularised, so that there is nothing inconsistent with the policy of the Act in the relations now established between the parties. The period of a mortgage by conditional sale made before the Act came into force and still subsisting is not to be altered if the mortgagee agrees that the sale condition shall be excised.

The Deputy Commissioner himself might have dealt with this case precisely as I have dealt with it if it had occurred to him to do so. As the Act is still new, I have recorded my reasons fully for the guidance of other Deputy Commissioners.

Application allowed.

No. 8.

Before the Hon'ble Sir Lewis Tupper, K. C. I. E., C. S. I.,
Financial Commissioner.

MAHR RANA,—(DEFENDANT),—PETITIONER,

Versus

THAKAR DAS AND OTHERS,—(PLAINTIFFS, —
RESPONDENTS.

REVISION SIDE.

Revision No. 142 of 1902-03.

Civil Procedure Code, 1882, Sections 108, 551—Dismissal of appeal under Section 551, Civil Procedure Code—Power of Original Court to subsequently set aside such decrees.

Held, that the decree of an Original Court merges in the order or decree of an Appellate Court passed under Section 551 of the Civil Procedure Code dismissing the appeal without notice to the Court below or to the respondent, and in a case where there is occasion for an application under Section 108 for setting aside such a decree, the application should be made to the Appellate Court.

Bapu v. Vajir ⁽¹⁾, dissented from. *Uma Sundari Devi v. Bindu Bashini Chowdhurani* ⁽²⁾, *Mehdi v. Bahadar* ⁽³⁾, and *Sayad Zahur-ul-Hassan v. Ganda Mal* ⁽⁴⁾, followed. *Thakur of Masuda v. The widows of the Thakur of Nandwara* ⁽⁵⁾, *Royal Reddi v. Linga Reddi* ⁽⁶⁾, and *Muhammad Sulaiman Khan v. Muhammad Yar Khan* ⁽⁷⁾, referred to.

*Petition for revision of the order of M. L. Waring, Esquire,
Collector of Multan, dated 27th February 1903.*

Harris, for petitioner.

Sohan Lal, for respondent.

The following judgment was delivered by

THE FINANCIAL COMMISSIONER.—The point for decision in this case is a technical one, namely, whether the decree of the lower Court merges in the order or decree of an Appellate Court passed under Section 551 of the Civil Procedure Code dismissing the appeal without notice to the Court below or to the respondent or his pleader. 4th October 1903.

The plaintiff, a mortgagee of certain lands, sued his lessee and co-mortgagees for rent for a certain harvest. He obtained an *ex parte* decree which included less interest than he claimed. He then appealed to the Collector to grant him additional

⁽¹⁾ I. L. R., XXI Bom., 548.

⁽²⁾ I. L. R., XXIV Cal., 759.

⁽³⁾ 30 P. R., 1900.

⁽⁴⁾ 4 P. R., 1901.

⁽⁵⁾ I. L. R., II All., 819.

⁽⁶⁾ I. L. R., III Mad., 1.

⁽⁷⁾ I. L. R., XI All., 267.

interest, and this appeal was dismissed by the Collector under Section 551 on June 13th, 1902.

On August 8th, 1902, the defendant obtained from the first Court an order setting aside the *ex parte* decree. The plaintiff raised no objection in consideration of the payment of Rs. 5 costs.

It subsequently came to the notice of the first Court that long before the order of August 8th, 1902, had been passed an appeal against the original *ex parte* decision had been rejected by the Collector. The first Court therefore held that its order of August 8th, 1902, was *ultra vires*, cancelled that order and consigned the case to the record room.

The defendant then appealed to the Collector who, holding that the decree of the first Court had merged in that of the Collector, rejected the appeal without going into the merits of the question whether the *ex parte* decree ought rightly to be set aside or not.

Various authorities were cited in argument, and it appears that the decisions of the High Courts are not altogether in harmony.

If we are to rely on *Bapu v. Vajir* ⁽¹⁾, the dismissal of an appeal under Section 551 is a decree, but is not a decree comprising the decree of the lower Court. "It leaves"—so it was held—"the decree of the lower Court untouched, neither confirmed, nor varied, nor reversed, and it remains the decree of the lower Court."

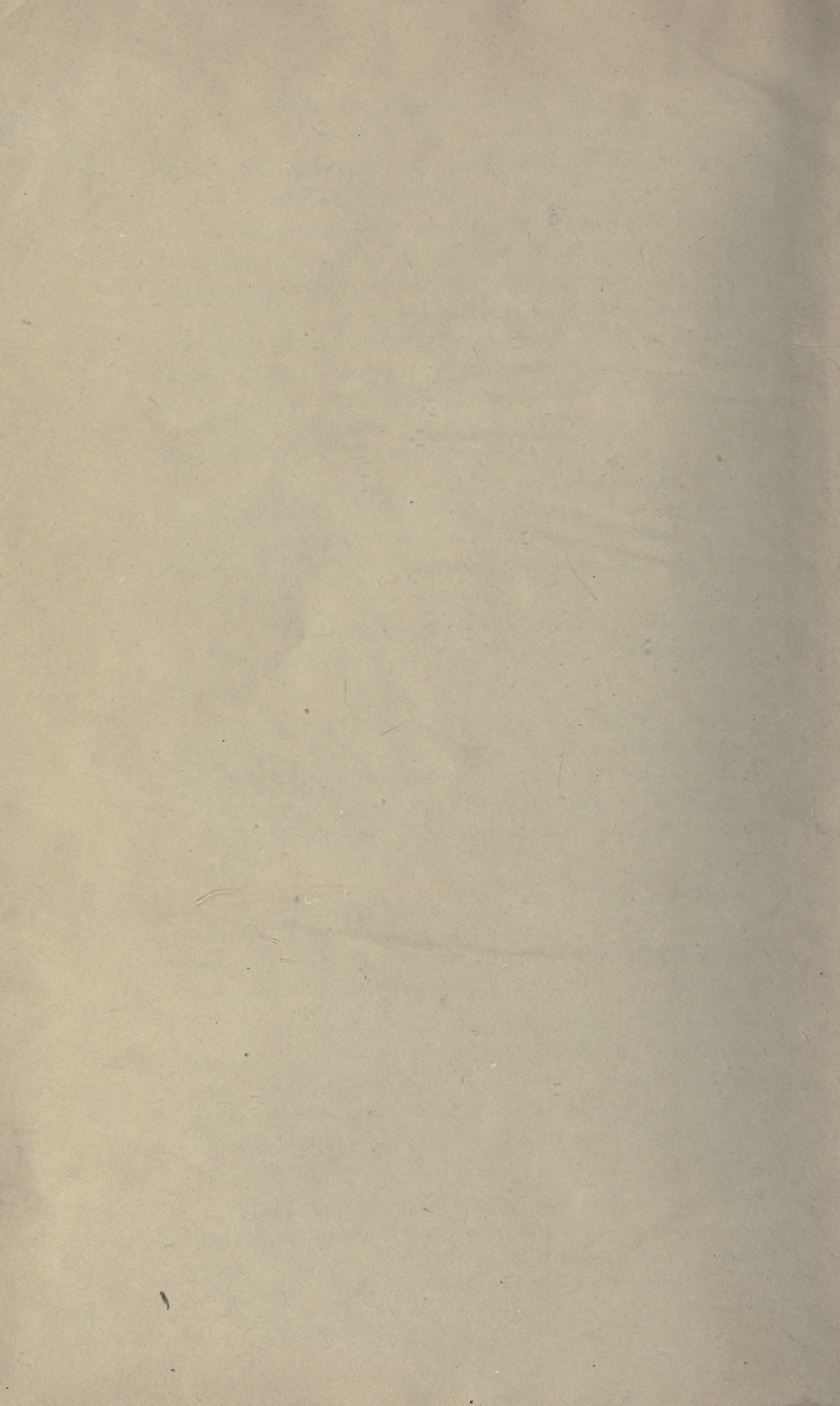
If so, the order of August 8th, 1902, was not *ultra vires*, and should be restored; because under Section 108 of the Civil Procedure Code the application to set aside an *ex parte* decree lies only to the Court by which the decree was made.

On the other hand, in *Uma Sundari Devi v. Bindu Bashini Chowdhurani* ⁽²⁾, it was held that there is no distinction between an appeal dismissed under Section 551 and an appeal dismissed under any other section of the Code after full hearing; and that the High Court has power to amend the decree which has in effect been confirmed by it.

I confess that the distinction between a superior Court confirming a decree and a superior Court passing an order, itself a decree, which leaves the decree of the lower Court untouched, appears to me to be a distinction without a difference.

⁽¹⁾ *I. L. R.*, XXI Bom., 648.

⁽²⁾ *I. L. R.*, XXI Cal., 769.



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